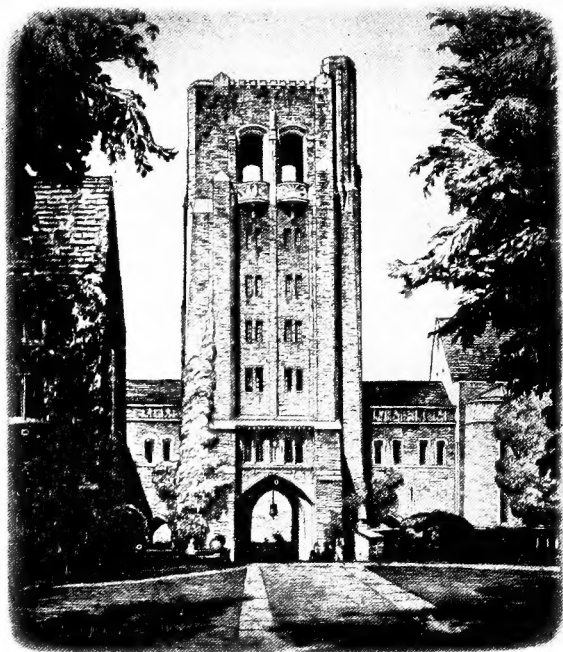




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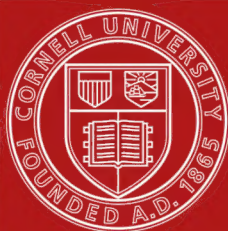
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THE
AMERICAN LAW
OF
REAL PROPERTY.

BY
FRANCIS HILLIARD,
COUNSELLOR-AT-LAW.

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THE

AMERICAN LAW OF REAL PROPERTY.

CHAPTER LX.

EASEMENTS.

- | | |
|---|---|
| <ol style="list-style-type: none">1. Incorporeal hereditaments.2. Easements—definition.3. How acquired—prescription—presumption of grant.7. Exception to general rule; uncultivated lands. | <ol style="list-style-type: none">8. Easement can never arise from enjoyment of known legal right.10. How lost; non-user; obstruction; presumption of release.13. A public easement is real estate.14. Easement and license—distinction. |
|---|---|

1. HAVING treated of *estates in land* and the *language in deeds and wills necessary to create them*; we now proceed, before considering the *modes of acquiring title to real estate*, to speak of a peculiar class of *tenements and hereditaments*, not strictly coming under the denomination of *land*, (see Vol. I, p. 1,) but still constituting a very important branch of the law of real property; viz., *incorporeal hereditaments*.⁽¹⁾ An incorporeal hereditament is defined, as a right issuing out of a thing corporate, or concerning, or annexed to, or exercisable within the same. It is not the thing corporate itself, but something collateral thereto; as, for instance, a rent issuing out of lands or houses.

2. Among the most important of incorporeal hereditaments, and including several distinct titles in this class of real estates, are *easements*, which will be considered in the present chapter. Easements are *charges on one estate for the benefit of another*.^(a) They are the same thing as the *servitudes* of the civil law, which have been defined as real rights, *jura in re*, existing in the property of another. By virtue of such a right, the proprietor of the estate charged is bound to permit or not to do certain acts in relation to his estate, for the utility or accommodation of a third person, or of the possessor of an adjoining estate.⁽²⁾

3. The use of an easement *for twenty years is evidence, not conclusive*

(1) 2 Bl. Comm. 20; Co. Lit. 19, 20.

(2) 3 Kent, 434. See *Salem, &c. v. Hayes*, 5 Cush. 458.

(a) "An easement is a privilege that one neighbor hath of another, by charter or prescription, without profit" *Terms de la Ley*; "a book of great antiquity and accuracy," per Bayley, J. *Hewlins v. Shippam*, 5 B. & C. 229. See *Cary v. Daniels*, 5 Met. 236; *Chelsea, &c. v. Bowley*, 7 Eng. L. & Equ. 376.

It is said, *servitudes by implication* must have a character of *permanence and continuity*, such as that of ways and lights, which the use of a well and privy has not. *Durel v. Boisblanc*, 1 La. Ann. R. 407.

evidence, of a right, or it does not raise a presumption *juris et de jure*; unless it has been continued, uninterrupted and adverse, that is, under a claim of right, with the owner's acquiescence and knowledge. A transmission from ancestor to heir, or from seller to buyer, is not deemed an interruption; but any interruption by an adverse claim and possession destroys the prescription.(1)

4. It is said, no period short of twenty years has been allowed to raise *the presumption of a grant* in this country; nor has it been definitely settled that any shorter period will suffice in England. The same rule applies to an individual, and to the public. The length of user mentioned is necessary to obligate the public to repair a way.(2)

5. The prescriptive title to an easement, arising from long continued use, has been usually regarded as founded upon *the presumption of a grant*,(a) and therefore not fixed and absolute, (as has been stated, sec. 3,) but liable to be rebutted by contrary proofs. But, in some late cases, the right is rested upon other foundations, and the lapse of time held *conclusive* evidence of title. Thus the personal disability of an intervening proprietor does not impair the easement, although inconsistent with the presumption of a grant. So, it is said, the presumption arising from the use of an easement is founded on the principle of *quieting rights*, because, if there were a grant, it would be on record.(3)

6. In Pennsylvania, an enjoyment for twenty-one years raises the presumption of a grant, whether the land is enclosed or open, cleared or woodland.(4) (See ch. 61, sec. 29.)

7. But it has been said, in Maine, that, in general, the cases relating to the presumption of a grant are inapplicable to lands, a great portion of which has never been improved; where the proprietors live at a distance, and settlements are made on small portions of large lots, without the knowledge of the owners, or a claim of title by the settlers; or where there is a usage for people to collect near a river for the transportation or sale of lumber, and they have no other purpose in view than a mere temporary use. Hence, where a spot on the bank of a river was claimed as a public landing-place, but no definite limits were proved, and a usage was shown to deposit lumber on the lot adjoining for many rods upon the bank, and, within one mile, there were four other places called and used as landings, and, till within a short period, the owners lived out of the State; held, the public right was disapproved.(5)

(1) *Sargent v. Ballard*, 9 Pick. 251; *Rowland v. Wolfe*, 1 Bai. 56; *Clay v. Thackeray*, 2 Moo. & R. 244.

(2) *Gayetty v. Bethune*, 14 Mass. 55; *Rowell v. Inhts. &c.* 4 Greenl. 270.

(3) 3 Kent, 444; *Cambell v. Wilson*, 3 E. 294; *Livett v. Wilson*, 3 Bing. 115; *Tyler v.*

Wilkinson, 4 Mas. 397; *Mayor, &c. v. Horner, Cow.* 102; *Wright v. Freeman*, 5 H. & J. 477. See *Kenyon v. Nichols*, 1 R. I. 412.

(4) *Worrall v. Rhoads*, 2 Whart. 427; *Newman v. Rutter*, 8 Watts, 51.

(5) *Bethum v. Turner*, 1 Greenl. 111.

(a) A grant on condition may be presumed from an adverse use of 20 years, and the performance of a duty connected with the easement. *Watkins v. Peck*, 13 N. H. 360.

A grant cannot be presumed from one incapable of making it. *Watkins v. Peck*, 13 N. H. 360.

As from a guardian, to continue beyond his guardianship. *Ib.*

An application within twenty years, to purchase the right from the owner of the land, negatives an adverse enjoyment and the presumption of a grant. Otherwise, where such application is made after twenty years. *Ib.*

8. The enjoyment of a *known legal right* furnishes no ground of presumption either for or against a grant. A right is sometimes presumed, where its origin is not to be found. By the lapse of time, wrongs ripen into rights; but enjoyment of a right gives no title to a continuance of it beyond its own limits.

9. Upon this principle, where, by an act of the legislature, any owner of a mill is authorized to flow the neighboring lands, paying damages to the proprietor of them; inasmuch as the consent of the latter is not necessary, it shall not be presumed, even after a user of forty years. In such case, if the act is relied on to rebut such presumption, in a complaint for flowing, the question is for the court, not for the jury. Nor can the defendant allege that he has flowed the lands by wrong, and therefore adversely, and not by virtue of his statutory right. The fact, that no complaint has ever been filed before, is immaterial. It is like the case of a lessee who promised, but has never been called on, to pay a stated rent.(1)

10. As an easement may be gained by twenty years' use, upon the presumption of a *grant*; so it may be lost by twenty years' disuse, upon the presumption of a *release*. But it seems a mere *non-user* is not of itself sufficient to produce this effect, without some act by the party charged by the easement, which is inconsistent with or adverse to it. Whether the right has been abandoned, is a question of fact and intent for the jury. The statute of limitations is held to be no bar. By the civil law, the right to a servitude could be forfeited only by the erection of buildings of a solid and permanent character, which obstructed it, with permission of the owner; or else of buildings of a different description, continued for more than twenty years, by an implied permission. Any act done or permitted by the owner of an easement, which is inconsistent with it, extinguishes the easement; and, if extinguished for a moment, it is lost forever.(2)

11. It is said, *public rights* cannot be destroyed by long-continued encroachments. A party claiming rights inconsistent with those of the public, must put himself on the ground of prescription, or authority from the government.(3)(a)

(1) *Tinkham v. Arnold*, 3 Greenl. 120; *Seidensparger v. Spear*, 5 Shepl. 123.

(2) *Lawrence v. Obee*, 3 Camp. 514; 2 Ev. Poth. 136; 3 Kent, 448-9; *White v. Crawford*, 10 Mass. 183; *Haight v. Props. &c.*, 4

Wash. Cir. 601; St. 2 & 3 Wm. IV, ch. 71; *Carr v. Foster*, 3 Ad & El. (N. S.) 581; *Parkins v. Dunham*, 3 Strobb. 224.

(3) *Arundel v. McCulloch*, 10 Mass. 71.

(a) On the other hand, twenty years' enjoyment will not authorize the use of an individual's soil upon navigable water, as a public landing-place, against his will. Such use can be justified neither upon the ground of prescription nor dedication. *Pearsall v. Post*, 20 Wend. 111. A grantee of the right to dig ore in another's land, does not lose it by mere *non-user* for forty years, there being no act of adverse enjoyment on the part of the owner of the land; and such adverse enjoyment is not evidenced by his merely occupying and cultivating the land. *Arnold v. Stevens*, 24 Pick. 106.

One who purchases a *servient* estate, after extinguishment of the easement, is not liable for obstructing the easement, to a subsequent purchaser of the *dominant* estate. *Ballard v. Butler*, 30 Maine, 94.

Claim of an easement in land adjoining the mill of the plaintiff, on the ground that from 1822 to 1846 the premises had been used by him as part of his mill-yard, to lay logs, &c., upon. The defendant, offered evidence, that from 1829 to 1834, both inclusive, no such use of the premises was made. Held, this interruption would be sufficient to prevent any prescriptive right, though the premises remained unoccupied from 1822 to 1846, except by the plaintiff, though no notice was given him to cease the occupation, no act done by the owner

12. The extinguishment of an easement may take place by act of God, of the law, or act of party. The last may extinguish, where the two first would only suspend the right; and will be construed strictly against the party. If the owner of a servitude buys the land to which it is incident, and resells it without reservation, the servitude is extinct. But if an obstruction is erected by another person between the land and the service, the latter is merely suspended till the obstruction be removed. The servitude is extinguished by a permanent obstruction erected by or with consent of the party, or by voluntary acquisition or acceptance of an incompatible right, and it cannot be revived. The principle does not apply where the obstruction is for a temporary purpose, though solid, nor when permanent, if it is in aid of the former easement, though both cannot be used at once. An extinguishment takes place, *a fortiori*, where a third person has purchased the land, during its suspension.(1)(a)

13. An easement for the public in the land of others is not personal estate, but a real franchise, holden by the Commonwealth for the benefit of all the citizens.(2)

14. The nature of the title, acquired by a *license* to enter and improve land, has been already considered in connection with the subject of *Lease*. (See Vol. I, *Lease*.) A license is also analogous in some points to an easement, although the privilege arising out of it has been very variously treated in different cases. The general rule is stated to be, that where one man gives to another a parol license to do an act, the effect of which will be to impair the light or air of the former, this license is not revocable after the act has been done; and even a bill in equity may be brought to enforce the contract. But where the act to be done is in its nature temporary, as, for instance, the erection of a

(1) *Taylor v. Hampton*, 4 McCord, 102, 3—6-7. (2) *Spear v. Bicknell*, 5 Mass. 129; *Strout v. Berry*, 7, 385.

of the land, indicating an intention to interrupt or disturb him; and though he used the premises for the above purpose more than 20 years, exclusive of the period omitted, provided the omission did not arise from an abandonment of his claim. *Pollard v. Barnes*, 2 Cush. 191.

Mortgage of land, after granting an easement thereon. The mortgagee foreclosed, not making the owner of the easement a party to the decree. Held, the easement was not extinguished. *Combs v. Stewart*, 10 B. Mon. 463.

Although an interruption in the enjoyment of an easement, for less than a whole year, does not prevent altogether the operation of section 2 of Stat. 2 & 3 Wm. IV, ch. 71, instances of such interruption are material for the consideration of the jury, on the issue, whether the enjoyment has been of right. *Eaton v. Swansea, &c.*, 5 Eng. Law and Equ. 340.

In case against a water-work's company, incorporated for the obstruction of a water-course, the issue being, whether the enjoyment of the water-course by the plaintiff had been of right, evidence was given for the defendants, that they had at different times interrupted the plaintiff in taking water from the water-course; and, a servant of the plaintiff having removed a stone which prevented the water from flowing into the plaintiff's meadow, an information was laid by the defendants against the servant, for drawing off water from the water-works, contrary to the act, and he was convicted. The plaintiff's son attended, at his father's desire, before the magistrates, and paid the fine; and the plaintiff did not appeal, an appeal being given by the act. Held, the information and conviction were admissible against the plaintiff. *Ib.*

(a) Conveyance by A to B, his heirs and assigns, of the right to build the east wall of his house on the top of the west wall of A's house. Held, this created a mere easement, but that it still continued, though all of A's building except the west wall had been burnt; and therefore A could not maintain ejectment for the land. *Brondage v. Warner*, 2 Hill, 145.

dam, and this afterwards falls to decay; no right remains for the erection of a new one. And some cases have held, that an easement, as, for instance, a right to hunt or fish, cannot pass by a parol or even a written but unsealed license, though acted upon; but the license may be revoked.(1)

15. It is held in Vermont, that a license from one man to another to erect a building on land of the former cannot be revoked, so as to prevent the latter from entering to remove it.(2)

16. An easement is said to be a permanent interest in another's land, with a right at all times to enter and enjoy it, and must therefore be founded upon a grant by deed or writing, or upon prescription. But a license is an authority to do a particular act, or series of acts, upon another's land, without any estate therein. It is founded in personal confidence, and not assignable. Hence, a license may arise by parol. Chancellor Kent is of opinion that the distinction above named is quite subtle, and difficult to be understood; and he mentions several cases on the subject, which seem not easily reconcilable.(3)

17. The court in Maryland, in the case of *Hays v. Richardson*,(4) enter into an examination of the authorities relating to the nature of the interest created by a license. In *Wood v. Lake*,(5) there was a parol agreement that A should have liberty to stack coals on land of B for seven years, and have the sole use of this part of B's close. This was held to create neither an estate nor interest *in or out of land*. It is remarked upon this case, that the same construction must have been given, if the license had been for ninety-nine years, renewable forever. In *Crosby v. Wadsworth*,(6) a parol sale of growing grass was held void. The case in Say relies upon *Webb v. Paternoster*,(7) which decides that a parol license to stack hay upon land is a charge upon the land in the hands of everybody, but that it is countermandable, unless a time certain be fixed for its enjoyment—"as if I license one to dig clay in my land." It is said this case was prior to the statute of frauds; that stacking hay upon land and digging clay in it, are widely different acts; and the question is made, whether an oral license to dig coal for five hundred years, and have the sole use of the land, would not create an interest in the land.(8) In *Taylor v. Water*,(9) Gibbs, Ch J., says, a license to enjoy a beneficial privilege on land does not create an interest in the land, and is good without writing. But in *Fentiman v. Smith*,(10) where A gave B a parol permission to pass water to B's mill by a tunnel over A's land, which A assisted to make, and afterwards obstructed the water; held, the right could not pass without deed. Mr. Sugden(11) says, the case of *Wood v. Lake* is in the very teeth of the statute. In *Thompson v. Gregory*,(12) the right to overflow land, by erecting a dam,

(1) *Webb v. Paternoster*, Palm. 71; 2 Eq. Cas. Abr. 522; *Short v. Taylor*, Ib.; *Winter v. Brockwell*, 8 E. 308; *Le Fevre v. Same*, 4 Ser. & R. 241; *Rerick v. Kerne*, 14, 267; *Bridges v. Blanchard*, 3 Nev. & Man. 691; *Cocker v. Cowper*, 1 Cromp. Mees. & Ros. 418; *Bird v. Higginson*, 4 Nev. & Man. 505. And see *Hepburn v. McDowell*, 17 S. & R. 383; *Liggins v. Inge*, 7 Bing. 682.

(2) *Barnes v. Barnes*, 6 Verm. 387.

(3) 3 Kent, 452; *Wood v. Lake*, Sayer, 3; Sugd. on V. & P. 66; *Taylor v. Walters*, 7

Taun. 373; *Cook v. Stearns*, 11 Mass. 533; *Ricker v. Kelley*, 1 Greenl. 117; *Clement v. Durgin*, 5, 9.

(4) 1 Gill & John. 382.

(5) Say, 3.

(6) 6 E. 602.

(7) Palm. 71; Poph. 151.

(8) 1 G. & J. 382-3.

(9) 7 Taun. 384.

(10) 4 E. 107.

(11) Sug. Vend. 57.

(12) 4 John. 81.

was held to be an incorporeal hereditament, and to pass only by deed—certainly not without writing, since the statute of frauds. From this examination of cases, the court in Maryland conclude that the act providing for the execution and recording of deeds precludes any parol license relating to land. The object of the statute is “to secure the estates of purchasers.” Hence, all rights, incumbrances or conveyances, touching or connected with land, must be recorded. The act includes not only *lands*, like the statute of frauds, but tenements and hereditaments.(1)

18. In the same State it is held, that the release of a way by parol is a mere license, which is revocable.(2)

19. Another important case upon this subject, is that of *Hewlins v. Ship-pam*.(3) In this case, A gave a license and authority to B, his heirs and assigns, to make a drain across A's yard, for the passage of water from a scullery belonging to B. In an action against A for obstructing the drain, the declaration stated the license: 1. As indefinite as to time. 2. To last while A should have possession of the land. 3. To last so long as should be requisite for the convenient occupation of B's house. Held, an authority given in either of these forms would create an uncertain interest, which, in construction of law, is a freehold for life. Hence, although the license, till countermanded, would excuse B from a trespass in entering A's land, it was insufficient to sustain this action, which must rest on title. Bayley, J., remarked,(4) that a right of way or of passage for water, even where it is not an *interest in land*, is an incorporeal hereditament, *lies in grant*, and certainly, if freehold, and it seems even though less than freehold, cannot pass without deed.(5)(a) An important distinction was taken between this case and that of *Winter*

(1) 1 G. & J. 384.

(2) *Wright v. Freeman*, 5 H. & J. 467.

(3) 5 Barn. & Cress. 221.

(4) 5 B. & C. 229.

(5) 8 E. 309.

(a) To this point the following authorities were cited: Co. Lit. 9 a, 42 a, 85 a, 169; Touch. 231-2; 2 Rolle's Abr. 62; 9 Co. 9; Gilb. Evi. 96; Bolton v. Bishop, &c., 2 H. Bl. 259; Rumsey v. Rawson, 1 Ventr. 18-25, (which was a case of license.)

The tenant of a frame building, which had extended over an adjoining lot more than 21 years, was informed that a survey had been made by order of the adjoining owner, with the intention of building on the true line. He expressed his satisfaction, declined to examine the survey, and told the owner of the other lot to go on and put up the wall. Held, after commencement of the work the license became irrevocable, and ejectment did not lie for the land covered by the new party-wall. *Marsh v. Weekerly*, 1 Harr. 250.

An executory agreement between an individual and a railroad company, that the latter shall continue to stop with their cars at a particular place adjacent to the property, as a permanent arrangement; is, in substance, the grant of an easement or servitude, binding upon the property of the company, and an interest in land, required by the statute of frauds to be in writing. Such an agreement by parol would also be void by the statute of frauds, as an agreement not to be performed within one year from the making thereof. *Pitkin v. Long Island, &c.*, 2 Barb. Ch. 221.

A municipal corporation, owning the land on the shore of a river or harbor, conveyed to A the land under water, from high water mark, “reserving so much of the same as would be necessary to make Washington Street 60 feet wide, and West Street 70 feet wide.” In the deed were covenants of A, in respect to the building of wharves, &c., and the corporation covenanted therein, that A and his heirs, performing their covenants, “should and might, at all times thereafter, have and enjoy the wharfage, and benefits, and advantages growing or arising from the wharves to be erected.” Held, the deed conveyed to A conditionally an interest in the bulkhead or wharf at the end of the streets, which was real property, an incorporeal hereditament; and was not a mere personal covenant. *Boreal v. City, &c.*, 2 Sandf. 552.

v. Brockwell, in which A had the privilege of a light opening upon B's land, and consented to B's obstructing it, whereby B incurred an expense; and it was held, that A could not retract his consent without reimbursing B. "This case was not the grant of an easement upon the grantor's land, but a permission to the grantee to use his own land in a way in which he would have a right to, but for the plaintiff's easement."⁽¹⁾ It was further remarked upon the cases of *Webb v. Puternoster*, *Wood v. Lake*, and *Taylor v. Waters*, that they were not cases of a freehold interest, and the objection was not taken that the right lay in grant, and therefore could not pass without deed.^{(2)(a)}

CHAPTER LXI.

WAYS, PRIVATE WAYS.

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| <ul style="list-style-type: none"> 1. Definition. 4. Classification. 6. Private ways—course and terminations—construction of language—uncertainty, &c. 22. How acquired—by prescription. 42. By grant. 47. By necessity—general doctrine. 50. Arising from the levy of an execution. 56. Are newly created. 59. Construed strictly. | <ul style="list-style-type: none"> 60. Ways in gross and appendant. 64. Privileges and appurtenances—whether a way passes under. 68. How ways may be used—party has no right to go beyond the <i>terminus</i>. 75. Or out of the way, though impassable; distinction between ways in this respect. 84. Extinguishment of way by unity of possession. 92. Laying out of private way. |
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1. A RIGHT of way is the privilege which an individual, or a particular class of individuals, such as the inhabitants of a village, may have of going over another person's ground.^(b) Though in common parlance not called *real estate*, it is an incorporeal hereditament of a real nature, and falls within these terms, as used in a statute. It is said to be only an easement upon the land of another. Hence, trespass does not lie for its obstruction. On the same principle, if freehold, it must be created by deed.⁽³⁾

2. Conveyance under seal as follows: "I hereby authorize R to open and continue open a road through my field, beginning, &c., as also to build, keep in repair and use a bridge over the branch in the field on which said road will pass; said road and bridge being intended as well for public use as for that of R; and to continue till R and myself shall agree it shall be shut or altered." Held, this was the grant of an incorporeal hereditament, to last till both parties should agree to discontinue it, and must be acknowledged and recorded.⁽⁴⁾

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| <ul style="list-style-type: none"> (1) 5 B. & C. 232. (2) <i>Ib.</i> (3) <i>Conner v. New, &c.</i>, 1 Black. (Ind.) 45; <i>Lazaretto, &c.</i>, Ashm. 421; 3 Cruise, 72; <i>Spear v. Bicknell</i>, 5 Mass. 129; <i>Hewlins v.</i> | <ul style="list-style-type: none"> <i>Shippam</i>, 5 Barn. & Cr. 221; <i>Wright v. Freeman</i>, 5 Har. & J. 475; 12 Wend. 98; 20, 99. (4) <i>Hays v. Richardson</i>, 1 Gill & J. 366. |
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(a) For important modifications of the law of easements in England, see St. 2 & 3 Wm. IV, ch. 71.

(b) The right of way is an accommodation which none can claim without equivalent. *Rowland v. Wolfe*, 1 Bal. 58.

3. A right of way may be attached to a house, entry, gate, well, or city lot, as well as to a country farm.(1)

4. Ways are said to be of three kinds. First, a footway. Second, a footway and horseway, vulgarly called in England a pack and prime way. Third, a cartway; which is either *regia via*, the king's highway for all men, or *communis strata*, belonging to a city or town, or between neighbors and neighbors.(2)(b) In Tennessee, public ways are divided into three classes—stage, wagon, and those for a single horse and rider.(3) In Pennsylvania, there is a distinction between a right of way, and a *private road*; as, for instance, a road running from a navigable river to the highway.(4)

5. It seems, to the way which is common to the whole people is a highway, whether leading directly to a market town or only from town to town. So also any cartway. But a way to a parish church, or to the common fields of a town, or to a village, which terminates there, is a private way. And whether a way is a highway or not, depends much upon reputation.

6. A man may prescribe for a way from his house through a certain close to the church; though owning lands which adjoin the house, and which he must first pass. For the general prescription shall be applied only to the lands of others.(5)

7. One may have a right of way through a church-yard.(6)

8. One man cannot claim a way over another's ground from one part thereof to another; but only from one part of his own land to another.(7)

9. A way may be appurtenant to an island, though separated from the main land by a navigable river.(8)

10. A right of way, *ex vi termini*, imports a right to pass in a particular direction, and not the right to change such direction at pleasure.(9) (*Infra*, s. 68.)

11. To an action of trespass *qu. claus. freg.*, A pleaded a right of way by prescription, from the upland, across B's salt marsh, (the *locus in quo*,) to A's marsh, *where most convenient to A, and least prejudicial to B*; also the same right by non-existing grant. Held, *as a custom*, the right claimed would be unreasonable, uncertain, productive of litigation, and therefore void; and that A's habit of passing over the land in different directions, however long continued, could neither give a right to do so, nor a specific right of way in one course. A grant, in the words of the plea, would authorize the grantee to elect the course of the way, but not to change it afterwards.(10)

12. It has been since held, that to an action of trespass the defend-

(1) 3 Kent, 436.

(2) 1 Inst. 56 a. See *Cowling v. Higginson*, 4 Mees. & W. 245.

(3) Ten. St. 1821, p. 10.

(4) Ashm. 417.

(5) *Slowman v. West*, Palm. R. 387; *Senhouse v. Christian*, 1 T. R. 570.

(6) Jenk. Cent. 3 Ca. 94.

(7) *Staple v. Heydon*, 6 Mod. 3.

(8) Ashm. 421.

(9) *Jones v. Percival*, 5 Pick. 485. See *Hinchliffe v. Kinnoul*, 5 Bing. N. 11.

(10) *Jones v. Percival*, 5 Pick. 485.

(a) In England, there is also a class of ways known as *occupation* ways. *Brownlow v. Tomlinson*, 1 Mann. & G. 484. Such a way does not lose its character by becoming a highway. *Ib.* But, in Massachusetts, a way leading to buildings is extinguished by a highway located over the site of such buildings. *Hancock v. Wentworth*, 5 Met. 446.

ant may plead, that he owns an adjoining close, and has as appurtenant a right to pass *in all directions* over the plaintiff's close.(1)

13. Where a way is granted without designating the place, long continued usage fixes it, and the grantor cannot alter its course. But if altered, and if the grantee uses the new way, his assent to the alteration is presumed.(2)

14. Under the grant of a way to *cross* the land of the grantor, the grantee has no right to enter at one place, go partly across, and come out at another place on the same side of the lot, for the purpose of avoiding a hill on his own land; nor is parol evidence admissible to show that this was the intention of the parties. But a contrary construction is favored by the facts, that the grantee's lot did not adjoin the highway, and communicated with it only by a way at sufferance, which might, at any time, legally be stopped; and that there had been either a location of the way at another place, or a non-user for nearly forty years.(3) (As to the construction of the grant of a right of way, see *infra*, sec. 44.)

15. A conveyed to B the eastern half of A's dwelling-house, with the land under the same, and cellar; also, a lot of land eastward of the house, &c.; reserving, however, the right to "pass through said lot to the outer cellar-way, and *through* said way and cellar," &c. Held, that A retained the right of passing through the cellar to his own part of the house above, though he should have no business in the cellar.(4)(a)

16. A and B, being adjoining owners, agreed by indenture, each to throw open a certain portion of his land for a way; mutually covenanting that the way "shall forever be kept open, clear of buildings or other encroachments." A memorandum was added, as follows: "A has liberty to pass occasionally for repairing, and other special purposes, and for light and air to his buildings." B might use the way for passing as a gangway at all times, and for light and air, or other uses, not obstructing A's privileges above described. B erected a fence along the line of his own land, and a gate at the street, for which A brings his action. Held, the covenant was not restricted by the memorandum, and the erection was unlawful.(5)

17. A was the owner of an alley twenty-four feet in width, between lots of B & C. B erected a house upon his lot, running twelve feet across the alley at one end, and A put up a fence along the alley, upon a line corresponding with the house, and so as to narrow the alley one-half, or more. A leases to B in fee the whole twenty-four feet, describing the land as a lot on which B's house partly stood, and reserving to himself a way for carts, &c., upon condition that B leave him in unobstructed enjoyment of the way. Held, the fence, erected by A

(1) *Emerson v. Wiley*, 10 Pick. 310.

(2) *Wynkoop v. Burger*, 12 John. 222.

(3) *Comstock v. Van Deusen*, 5 Pick. 163;
(*Choate v. Burnham*, 7 Pick. 274.)

(4) *Choate v. Burnham*, 7 Pick. 274. See
Newton v. Newton, 17 Pick. 201.

(5) *Brownell v. Dyer*, 5 Mas. 227.

(a) The counsel for the plaintiff, (B,) contended, that the reservation gave A the right of passing only through B's into his own *part of the cellar*. The opinion of the court seems to leave out of sight the fact that A retained any part of the cellar; the chief ground of decision being, that the word *through* would be wholly nugatory, if A could go only *to* the cellar. Whereas, upon the facts, the plaintiff's construction gave the word its proper effect, as much as the defendant's.

himself, was no obstruction, and that he could claim under the reservation only the portion not enclosed by it.(1)

18. A granted to B land of unequal width, described as abutting on a road on his own soil. The land abutted on the broadest part of the road, but in the narrowest part of it a narrow strip intervened between the land granted and the road. Held, B had the right of passing to the road over this strip.(2)

19. Grant of a free and convenient way, as well a horse-way as foot-way, as also for carriages, &c., in, through, over, and along, &c., to carry coal, &c., or other things whatsoever. Held, the grantee might lay a framed wagon-way along the land for transporting coals, this being the most convenient mode, but not transverse roads across the land.(3)

20. A occupied a house, between which and B's was a strip of land eleven feet wide. B grants to A the right of using this strip as a foot or carriage-way, with all the liberties, &c., incident or needful to its use, &c. Held, A might lay a flagstone before his door.(4)

21. A deed contained this clause—"also the privilege of passing on A's (the grantor's) land between the buttonwood tree and A's store, to the horse-barn, from the highway; to be kept open, &c., for the benefit of B (the grantee) and A." A owned the adjoining land, upon which his store stood. The barn was wholly on B's land, and the only way then used from the road to the barn was across the lands between the buttonwood tree and store. Held, this was not the reservation of a way to A, but the grant of one to B.(5)

22. A right of way may be claimed in three modes—by *prescription*, *grant*, and *necessity*.(6)(a)

23. Uninterrupted enjoyment of a way for twenty years, without evidence that it had been used by leave, favor, or mistake, is sufficient to leave to a jury to presume a grant, or to give a right by prescription.(b) As where the inhabitants of a village have, time out of mind, traversed a particular close or field, to get to their village church.(7)

(1) Jackson v. Allen, 3 Cow. 220.

(2) Roberts v. Karr, 1 Taun. 495.

(3) Senhouse v. Christian, 1 T. R. 560.

(4) Gerrard v. Cooke, 2 N. R. 109.

(5) Trumbull v. Isham, 14 Conn. 400.

(6) 2 M'Cord, 445; 5 Har. & J. 474. See

Regina v. Turweston, 1 Eng. L. & Equ. 317.

(7) Campbell v. Wilson, 3 E. 294; 3 Cruise, 73; Valentine v. Boston, 22 Pick. 75; Lansing v. Wiswall, 5 Denio, 213; Miller v. Garlock, 8 Barb. 153.

(a) In North Carolina, ways are divided into those laid out by public authority, and private ways, including ways by grant and prescription. 2 Hay. 302. In most of the States, provision is made for laying out *private* as well as *public* ways, by application to the public authorities. See *infra*, sec. 92.

Under the plea of right of way, in an action of trespass *quare clausum*, the defendant, after having undertaken to prove an express grant or reservation of a way by deed, may prove one by prescription. Hamilton v. White, 4 Barb. 60.

(b) It was remarked by the court in South Carolina, in 1823, (Lawton v. Rivers, 2 McCord, 450,) that an idea had prevailed, that the rule of presuming a grant from twenty years' possession, was adopted in South Carolina, though the court knew of no distinct decision. In Hill v. McClure, (2 Const. 424,) thirty years were held sufficient; and probably not less than twenty would be now required.

In North Carolina, (Bordeaux v. Williamson, 2 Hayw. 301, 302,) to an action of trespass by A against B, B pleaded a common way, used by the neighborhood, and leading to a landing and public road, and a usage to repair the way by cutting timber near for the purpose (which was the act complained of.) It was proved, that the way had been used by the neighborhood, for nearly forty years. Held, as the commencement of the way was known, it was not a good way by prescription.

24. Where to an action of trespass *qu. claus. freg.*, the defendant pleaded a common highway, from time immemorial, through the close; and proved the existence of the way for sixty years, no evidence being offered of its commencement; held, the plea was sustained.(1)

25. A prescriptive way must not only have existed immemorially, but the use must have been uninterrupted. Hence, the plea of such a way is not supported, if no period is shown of twenty years' continued use.(2)(a) Where one pleads the grant of a way by a lost deed, the plea must be sustained by proof of an uninterrupted use of more than twenty years by virtue of the deed.(3)

26. To constitute a way by prescription, it must have been immemorially and *exclusively* used by the party claiming it; and not by others also.(4)

27. So the power of a town to lay out a highway, and their acceptance of it, will not be presumed from long use, unless the use is commensurate with the highway claimed. Uninterrupted use, acquiescence and *identity*, are said to be necessary for the presumption of a grant.(5)

28. To constitute a way by prescription, the use must have been *adverse* and under claim of right. But it will be presumed to have been so, in the absence of evidence to the contrary; more especially, if *notorious*. But, where a way is reserved *by deed*, and the grantor and those claiming under him have used it in a mode nearly corresponding to the terms of the reservation, though long enough to give a prescriptive title; the use must be intended to have been under the deed, not adverse, and therefore the right will be limited by the terms of reservation.(6)(b)

29. Thus, the practice of passing over unenclosed forests, common to all, is insufficient to give such right.(7) (See ch. 60, sec. 6.)

30. A way had been used as a settlement road more than thirty years. The land, held by A, the defendant, was unenclosed woodland till eigh-

(1) *Odiorne v. Wade*, 5 Pick. 421.

(2) *Odiorne v. Wade*, 5 Pick. 421; *Lawton v. Rivers*, 2 McCord, 445; *Watt v. Trapp*, 2 Rich. 136.

(3) *Livett v. Wilson*, 3 Bing. 115.

(4) *Com. v. Newbury*, 2 Pick. 51; *Miller v. Garlock*, 8 Barb. 153. (See *Allen v. Ormond*, 8 E. 4.)

(5) *Watrous v. Southworth*, 5 Conn. 305;

Turnbull v. Rivers, 3 McCord, 131.

(6) *Atkins v. Bordman*, 2 Met. 457; *Miller v. Garlock*, 8 Barb. 153; *Esling v. Williams*, 10 Barr, 126.

(7) *Rowland v. Wolfe*, 1 Bai. 58; *Watt v. Trapp*, 2 Rich. 136; *Gibson v. Durham*, 3, 85.

(a) A had adverse possession of a way for two years; some years after which he conveyed to B, who had possession eighteen years. Held, insufficient to give a prescriptive right. *Kilburn v. Adams*, 7 Met. 33.

In an action of trespass to land, the defendant pleaded two pleas, founded on the 2 & 3 Will. IV, c. 71, alleging enjoyment of a way over the land for twenty and forty years, respectively; and offered evidence of *user*, commencing about forty-eight years before the commencement of the suit, and continuing until within about two years of that time, and that there had been no interruption by others. Held, the plea was not proved, and there was no evidence to go to the jury in support of it. *Low v. Carpenter*, 6 Eng. Law and Eq. 450.

Quære, whether a plea is good, which alleges the user to have been for twenty or forty years, as the case may be, preceding the commencement of the suit, without saying "next" preceding. *Ib.*

(b) A tract attached to an academy was purposely left open, and A, an adjoining owner, passed over it more than twenty years, in common with the academy, but oftener than any one else. Held, a mere permissive use, though one particular line was more marked by him than the rest of the land, and occasionally levelled, when gullied by the rains. *Kilburn v. Adams*, 7 Met. 33.

teen years before the obstruction complained of. It was then cleared and enclosed, leaving a lane, which was sometimes stopped by gates. Above the plantation of B, the plaintiff, the lane was obstructed by B and others, but was used as a *neighborhood road*, till recently stopped by B, and used by B till stopped by A. Held, B had no exclusive right to the way, it being common till his own obstruction; and that the user could not be adverse till the enclosure, which was but eighteen years before. Hence B could not maintain an action against A.(1)

31. So, where the plaintiff and other neighboring occupants passed over unenclosed land of the defendant, and the way was changed with the fields and fences, at the will of the defendant; held, the plaintiff acquired no prescriptive right against the defendant.(2)

32. Where one neglects to remove a house wrongfully erected on his own land, and which obstructs a way belonging to him, this is no abandonment of the right of way. An erection of the house by himself might be an abandonment.(3)

33. A way had been uninterruptedly used for twenty years. Afterwards it was used but little, and, in different years, three or four times obstructed, and some wide deviations had taken place from its original course. Held, the right of way was not hereby lost.(4)

34. It is said, in South Carolina, that a right of way is defeated only by an adverse and continued obstruction for five years.(a)

35. It has been decided in New Hampshire, that, where a way has been used over twenty years, the presumption arising therefrom may be rebutted, by showing that the owner of the land has ploughed it within that time, at the same time denying the right of way, though not in presence of the party claiming the right.(5)

36. In New York, when a right to a private way is acquired by prescription, or by a user of twenty years; it can only be lost by a non-user of twenty years, or by a release.(6) It is held, in Maryland, that adverse possession for more than twenty years is not a conclusive bar to a right of way, but only raises a presumption against it. But the user of another route over the land fortifies the presumption of release, arising from non-user of the former way.(7)(b)

37. In Connecticut, it is held, that a long continued non-user is *pri-*

(1) McKee v. Garrett, 1 Bai. 341.

(2) Turnbull v. Rivers, 3 McCord, 131.

(3) Rogers v. Stewart, 5 Verm. 215.

(4) Cuthbert v. Lawton, 3 McCord, 194.

(5) Barker v. Clark, 4 N. H. 380.

(6) Miller v. Garlock, 8 Barb. 153.

(7) Wright v. Freeman, 5 Har. & J. 467-77.

(a) Cuthbert v. Lawton, 3 McCord, 194. Whether, by virtue of some statutory provision, does not appear.

(b) A road, leading from the dwelling-house of the plaintiff, across the lands of others, to a village, had been used for travelling more than 40 years, and had formerly been part of a public highway. The commissioner, more than 20 years before the commencement of the suit, had changed the route of the highway, so as to discontinue it at a certain point, but the plaintiff and his predecessors in title, had continued to use and enjoy it, notwithstanding such discontinuance. The defendant, who occupied lands through which it ran, had recently obstructed it at such point. Held, the plaintiff was entitled to recover against him. Lansing v. Wiswall, 5 Denio, 213.

Statute 2 & 3 Wm. IV, ch. 71, sec. 2, provides, that where a way is claimed by prescription, if uninterruptedly enjoyed for twenty years, it can be defeated only by proving the first enjoyment to have been more than twenty years ago; and that an enjoyment for forty years shall give an absolute title, unless it has been under a consent in writing. 3 Harr. Dig. 2175.

ma facie evidence of the release of a highway ; as where the owner of the land kept up bars for ninety years.(1)

38. In Massachusetts, it has been successively held, that adverse occupation of more than twenty years raises a presumption of the extinguishment of a way ; but that this presumption is for the jury, and may be rebutted ; that non-user, or a tortious interruption for ten or twenty years, does not forfeit a right of way, if a previous immemorial usage is shown, or, *a fortiori*, a right founded on express grant, or exception ; that non-user of a way, for nearly forty years, raises a violent presumption against the right ; and that a way is not lost by non-user for less than twenty years.(2)

39. In Pennsylvania, an occupation for twenty-one years, adverse to and inconsistent with a way, bars the right. Non-user for twenty-one years has the same effect. But not for any shorter period.(3)(a)

40. Every immaterial change will not destroy the identity of a way. But the question will depend on the situation of the country.(4)

41. A way cannot be extinguished by a parol release. Such release is a mere license, which may be revoked.(5)

42. Secondly, a way may be acquired by express grant.(b) It has already been seen, that prescription itself proceeds upon the presumption of a lost grant.(6)

43. A way *in esse* may pass by bargain and sale ; but a way *de novo* only by grant or lease,(7)

44. The following cases may be cited relating to the constructions of deeds, by which rights of way are created or conveyed : (*supra*, sec. 15, etc.)

45. A, owning two adjoining messuages, which fronted east upon a street, in 1703 conveyed the southerly one to B. The deed set forth, that on the south side there was a gate and passage about five feet wide, from the street into the yard of the messuage. A reserves to himself, his heirs, &c., the right of passing through and upon the gate, &c., for carrying wood or any other thing over the yard or ground of the messuage, into and from the housing and land of A, without damage to B, his heirs, &c. It was also agreed, that B, &c, might add a building backward, of a breadth equal to that of the back of the chimneys of the tenement. The owner of the northerly messuage enjoyed the easement long enough to give a prescriptive title. Held, as the use conformed to

(1) *Beardstee v. French*, 7 Conn. 125.

(2) *Hoffman v. Savage*, 15 Mass. 130 ;
White a. Crawford, 10 Mass. 180 ; *Comstock*
v. Van Deusen, 5 Pick. 163 ; *Emerson v. Wil-*
ley, 10 Pick. 310.

(3) *Yeakle v. Nace*, 2 Whart. 123 ; *Dyer*
v. Depui, 5 Whart. 584.

(4) *Lawton v. Rivers*, 2 McCord, 445.

(5) *Wright v. Freeman*, 5 Har. & J. 467.

(6) 3 Cruise, 73. See *Durham, &c. v. Wal-*
ker, 2 Ad. & El. (N. S.) 940.

(7) *Hays v. Richardson*, 1 Gill & J. 366.

(a) In the same State, where there has been uninterrupted use of an alley for a passage and water-course, less than twenty years ; evidence is admissible of a contribution by the parties using it, to the laying and repairing of the pavement and fixing water-pipes below. *Lewis v. Carstairs*, 6 Whart. 193.

(b) The grant of a right of way, not mentioned in the deed conveying the estate, to which it is claimed as an incident, cannot be shown by evidence of the declarations of persons, appointed to make partition of lands, of which those conveyed are a part. *Trask v. Patterson*, 29 Maine, 499.

the deed, the easement was under and not adverse to the reservation, and must be construed thereby.(1)

46. B having arched over the passage, and narrowed it to the width of the old gate; held, A was not entitled to damages, unless the alteration made it materially less convenient. Also, that B might build north, to, but not beyond, the line of the chimney; that B might extend the old or a new building at pleasure, leaving a convenient passage across his lot to the other messuage, even after forty years' use of the passage, close to the rear of the old building; because the deed explained the use, and rebutted the prescriptive title to a passage in that precise place; and that B might raise the building to any height.(2)

46 *a*. The owner of a block of stores, and adjoining land, conveyed part of the land, parallel with and twenty feet from the block, "together with the right of passing and repassing over the space of twenty feet between the west wall of the store aforesaid and the eastern line of the before created premises." Held, these words described the land, in, through and over which the grantee should have a right of way, but not the limits of the way, which should be a convenient way within those limits, adapted to the convenient use and enjoyment of the land granted for any useful or proper purpose.(3)

47. Thirdly, a right of way may arise from *necessity*, which is founded upon an implied grant. Thus, if A convey to B land wholly surrounded by other land of A, (*a*) or in part by land of A, and in part by land of C; B acquires a way of necessity over A's land to the highway, but not over C's, (*b*) to be assigned by A wherever he may see fit; and, if he neglect to do it, by B; (*c*) upon the principle, that a deed shall be taken most strongly against the grantor; that when a man grants anything, he is held to have granted whatever is necessary to the use and enjoyment of the thing granted; and that it shall not be intended that one meant to make a void grant. Nor does it make any difference that the grantor conveyed merely as trustee. And the grants may occur at different times.

So also, if one convey several closes, reserving another close, from which there is no convenient way, except over one of those sold; the prevailing doctrine is, that he has the right of way over the latter from necessity. This rule is founded in part upon the ground, that it is against the public good that the reserved close should remain uncultivated. In one case Lord Kenyon adopted the principle upon authority,

(1) *Atkins v. Bordman*, 20 Pick. 291. In a subsequent case between the same parties it was held, that B might build over the passage, if he did not thus impair its convenience for the purposes of the reservation; although it thereby became a more common resort to A's annoyance. : *Atkins v. Bordman*, 2 Met. 457. Held; further, the deed did not precisely fix the width of the passage, but reserved a suitable one for the purposes stated. *Ib*.
(2) *Ib*.
(3) *Johnson v. Kinnircutt*, 2 Cush. 153.

(*a*) This case is sometimes spoken of as the *only* way of necessity. *Turnbull v. Rivers*, 3 McCord, 131.

(*b*) But see *Trask v. Patterson*, 29 Maine, 499. Where A conveyed to B a room adjoining a kitchen of A, and connected with it by a door, with the privilege of baking in an oven in the kitchen, and there was no other passage from such room to the kitchen within the house, except through the room of C; held, the plaintiff had an implied right to pass through such door into the kitchen for the purpose of baking, and need not show any previous use of the door, though for three or four years she had passed into the kitchen through the room of C. *Newton v. Newton*, 17 Pick. 201.

(*c*) Where there is land of the grantor convenient for a way, the grantee cannot have one over other land, of which he is but a tenant in common. *Collins v. Prentice*, 15 Conn. 39.

remarking, however, that it was attended with great difficulties. And it is said, the necessity for the way must not be created by the party claiming it.(1)(a)

48. A distinction has been made between a way of necessity, and a way which is merely an easement or convenience; implying that the term easement is not applicable to this class of ways.(2) (See s. 57.)

49. A had three lots of land, with a way from the first to the second, and from these two to the third. B purchased them all, and sold the two first to C. The only way to the lot retained was through the other two. Held, the way continued, from necessity.(3)

50. Where an execution is levied upon a part of the debtor's land, thereby separating the remainder from the highway, a way of necessity arises to the debtor.

51. In such case, the creditor has the right of locating the way, provided it be a convenient one. If he do not locate it, and build upon a part of the land, or convey it free from the easement, the location cannot be made over this part, if a sufficiency of land remains without it.(4)

52. In case of several levies upon land, the way of necessity shall be located over that part, the levy upon which has rendered it necessary.(5)

53. Where land lies between two roads, east and west of it, and the owner sells that portion of it which lies on the west of the road, the buyer has no right of way across the land of the seller to the road on the east, notwithstanding its distance, and the difficulty of otherwise reaching it.(6)

54. The levy of an execution upon a part of the debtor's land divided the remainder into two lots, one of which, lying northwest of the part levied on, communicated with the highway, and the other, lying north, did not. The levy reserved a way from the latter only. Held, it could not be extended by construction to the former.(7)

55. An execution was levied upon a debtor's front land, excepting a strip five rods wide upon one side of it, connecting the back land with the highway, but which it would cost from \$25 to \$300 to render passable for carriages. Held, a way of necessity did not remain to the debtor over the front land.(8)

(1) *Gayetty v. Bethune*, 14 Mass. 56; *Capers v. Wilson*, 3 McCord, 170; *Harding v. Wilson*, 2 B. & C. 96; *Holmes v. Goring*, 2 Bing. 76; *Pomfret v. Ricroft*, 1 Saun. 321-3, n. 6; 2 Rolle's Abr. 60; *Clark v. Cogge*, Cro. Jac. 170; *Howton v. Fearson*, 8 T. R. 50; *Turnbull v. Rivers*, 3 McCord, 131. (But see *Dell v. Babthorpe*, Cro. Eliz. 300;) *Dutton v. Tayler*, Lutw. 1487; 3 Rawle, 495; *Woolrych*, 21; *Collins v. Prentice*, 15 Conn. 39; *Holmes v. Seely*, 19 Wend. 507; *Salisbury v. Andrews*, 19 Pick. 250; *Brown v. Berkenmeyer*, 9 Dana, 160; *Snyder v. Warford*, 11

Mis. 513; *Stuyvesant v. Woodruff*, 1 N. J. 133.

(2) 3 Cruise, 76; 3 Kent, 423 & n.

(3) *Packer v. Welsted*, 2 Sid. 39. See *Reynolds v. Reynolds*, 15 Conn. 83; 24 Pick. 102; *Mendell v. Delano*, 7 Met. 176.

(4) *Russell v. Jackson*, 2 Pick. 574; *Capers v. Wilson*, 3 McCord, 170. See *Morris v. Edgington*, 3 Taun. 24.

(5) 2 Pick. 574.

(6) *Turnbull v. Rivers*, 3 McCord, 131.

(7) *Russell v. Jackson*, 2 Pick. 574.

(8) *Allen v. Kincaid*, 2 Fair. 155.

(a) A right of way by necessity exists, only where the party claiming it has no other means of passing from his estate into the highway. The right must be construed strictly. See *Symmes v. Drew*, 21 Pick. 278.

So, where land is sold for a specific purpose, and conveyed without reservation, the law will not imply, in favor of the vendor, a right of way of necessity, inconsistent with the object of the purchase. See *Seeley v. Bishop*, 19 Conn. 128.

56. It is said, that a way of necessity, arising either by reservation or grant, is to be considered as *newly created* by the implied grant or reservation.(1)

57. Where a way is merely a matter of *ease and convenience*, it will not be considered as arising by necessity, but by consent or agreement; and therefore liable to be extinguished in like manner, by unity of possession. (See sec. 48.) But the same principle which raises the implication of one way, may extend it to two or more.(2)

58. The inconvenience of passing to and from one's plantation by water is not sufficient to create a way of necessity over neighboring land. But a necessity for a day has the same effect, as if it continued for half a century. Neither time nor occupation is requisite, as in case of other ways.(3)

59. A right of way from necessity is said to be, not a fixed and located way, absolutely vested, but qualified by the necessity in which it originated, and liable to vary or cease with such necessity; as where the owner acquires the power of passing as directly over his own land or over a highway. It must also be *single*.(4)(a)

60. The distinction is taken between a right of way *in gross* or *mere personal right*, and a right of way *appendant or annexed to an estate*; that the former is merely personal, not assignable or descendible, and to be used only by the party himself, and not by any one else, even in his company; while the latter will pass with the land to which it is incident, more especially if *appurtenances, ways or easements* are expressly mentioned.(5)(b)

(1) *Grant v. Chase*, 17 Mass. 448.

(2) *Ib.*; *McDonald v. Lindall*, 3 Rawle, 495; *Nichols v. Luce*, 24 Pick. 102; *Symmes v. Drew*, 21, 278. See *Reynolds v. Reynolds*, 15 Conn. 83.

(3) *Turnbull v. Rivers*, 3 McCord, 131; *Lawton v. Rivers*, 2 McCord, 445.

(4) *Holmes v. Goring*, 9 Moo. 166; *Seely*

v. Bishop, 19 Conn. 128; *New York, &c. v. Milnor*, 1 Barb. Ch. 353; 2 Bing. 76; 3 Kent, 422; 14 Mass. 55; 3 Rawle, 492-5; *Cooper v. Maupin*, 6 Miss. 624; *Collins v. Prentice*, 15 Conn. 39.

(5) 3 Kent, 419; *Staple v. Heydon*, 6 Mod. 3; *Newmarch v. Brandling*, 3 Swanst. 99. See *Symmes v. Drew*, 21 Pick. 278.

(a) It is said, that a way of necessity is merely a right of ingress and egress to and from the land of the party claiming it. Hence, unlike a prescriptive way, it may be varied by the owner of the land, who may plead, to an action for obstructing the passage previously used, that he has assigned another. *Lawton v. Rivers*, 2 McCord, 450.

(b) Land partly bounded by a beach was divided among heirs; this portion being assigned to some, to others, other parts of the land, with the right of gathering sea-weed below the part near the beach. Held, this right was an incorporeal hereditament, appurtenant to the land, not a right in gross; that it could not be severed and sold without the land, and the sale of it to a stranger either was void or extinguished the right; and that the owner of the privilege might use the sea-weed upon any land, or sell or lease his share, while he remained owner of the land. *Phillips v. Rhodes*, 7 Met. 322. A deed granted the right of ingress and egress in certain alleys. Held, the right passed to subsequent purchasers. *Combs v. Stewart*, 10 B. Mon. 463.

Where a grant conveys, "the right of passing and repassing, draining, and all the usual easements," in and upon other land of the grantor; the easements become appurtenant to the estate conveyed, and may pass to subsequent purchasers, as appurtenances, without express words. *Underwood v. Carney*, 1 Cush. 285.

A devise of land, to which a right of way is appurtenant, will pass the easement, though not particularly specified. So where the owner of a farm, to which there was a right of way appurtenant, devised it in separate parcels to two persons; held, each acquired a right of way. *Lansing v. Wiswall*, 5 Denio, 213.

A right of way appurtenant to land is appurtenant to the whole and to every part of it; and, if such land be divided, and conveyed in separate parcels, a right of way thereby passes to each of the grantees. *Underwood v. Carney*, 1 Cush. 285.

61. But it has been held in Massachusetts, that a way in gross may be reserved or granted in various forms, to a person, his heirs and assigns, and is not necessarily personal to the grantee himself. And even where the expression *or his heirs* is used, the same construction will be given, to effect the intention. If the way existed before the grant, for the use of other adjoining land of the grantor, such reservation may be construed, either as a contract for a way in gross, or as an exception of an existing way appurtenant to the land remaining in the grantor. In either case, the way, being reserved to the grantor and *his heirs*, will pass to a devisee of all his real estate.(1)

62. It is said, a right of way is never presumed to be in gross, where it can be fairly considered as appurtenant. The latter is the *most worthy*.(2)

63. A right of way assigned to a widow, over land of the husband, in connection with her dower, is not personal, and does not cease with a transfer of her estate to a stranger. But it is appurtenant to her dower, and ends with her life.(3)

64. The words "privileges and appurtenances" in a conveyance may pass a right of way in actual existence, but will not create a new easement; more especially where there are other privileges, such as that of a well, to which those words may properly be applied.(4)

65. An owner of two closes, over one of which a way had been immemorially used to the other, devises the latter *with the appurtenances*. The way does not pass.(5)

66. A person being the owner of three closes, A, B and C, used a way over C, in passing between A and B. He afterwards conveyed A and B, *with their appurtenances*. Held, no right of way passed to the grantee. No man can have a way through his own land, independent of his right to the land. The grantor, therefore, had no easement; and none passed to the grantee. Nor were the words sufficient to create a new easement. It might have been otherwise, had there been a grant of all ways commonly used with the land.(6)

66 *a.* A, the owner of two adjoining tracts, each bounding on the highway, had been accustomed for many years to pass from his mansion on the one across the other, to and from the public road. After his death, the land on which the mansion stood was sold, and came into the hands of B. The adjoining premises were subsequently sold, and came into the hands of C. About 19 years after the severance, C closed the way. Held, the right of way, as an easement, did not exist previously to the severance, and did not pass by the deed under which B claimed title, under the word "appurtenance," not being a way of necessity; and that B could not claim the right of way, there having been an adverse enjoyment of less than 20 years.(7)

67. It has been held in England, that, where the grantor of land has other land adjoining, over which he has used ways to the former, and the grant is made *with all ways appurtenant*; the ways in question pass,

(1) *White v. Crawford*, 10 Mass. 183.

(2) *Lazaretto, &c.*, 1 Ashm. 421.

(3) *Hoffman v. Savage*, 15 Mass. 130.

(4) *Gayetty v. Bethune*, 14 Mass. 54. See *Harding v. Wilson*, 2 B. & C. 100; 3 D. & R. 287; *Kooystra v. Lucas*, 1, 506; 5 B. & A. 830; 3 Tyr. 280; *Barlow v. Rhodes*, 1 Cr.

& Mees. 439; 2 Nev. & M. 517. See *Hinchliffe v. Kinnoul*, 6 Scott, 650.

(5) *Whalley v. Thompson*, 1 B. & P. 371.

(6) *Barker v. Clark*, 4 N. H. 380; (*Atkins v. Bordman*, 20 Pick. 301-2.)

(7) *Stuyvesant v. Woodruff*, 1 N. J. 133.

unless there are others in the soil of other persons, to which the words may be referred.(1)

68. The use of a way must be limited to the terms of the grant or reservation, or the intent of its original creation. (*Supra*, sec.10.) Hence, where one has a right of way to go a certain place, he cannot lawfully use it to go beyond that place.(a) It has been said, that this rule prevents the party from going beyond the place designated to other land of his own, but not to a mill or bridge. But it has been since suggested, that the true point of inquiry is, *quo animo* the person visited the place fixed, whether to do business there, or merely on his way to another place.(2)

69. By the partition of a farm, the right of passing and repassing across lot A, a part belonging to the plaintiff, became appurtenant to B, a part belonging to the defendant, who also owned C, beyond but adjoining B, and not fenced from it. Held, the defendant had no right to use the way as a way from C, though in so doing he passed last from B on to the plaintiff's close.(3)

70. The defendant, after loading his cart with produce partly taken from each of his lots, passed with it from B over the plaintiff's close. Held, this was an abuse of the defendant's right, which subjected him to an action of trespass *qu. claus.*(4)

71. The principle above stated, (sec. 68,) is said to be applicable to the grant of an easement; but a doubt is suggested, whether it applies to one who owns the soil, subject to an easement granted by himself. Gibson, Chief Justice, remarks, that there is no authority, that the grant of the way passes the whole use of it, unless there is a reservation; but, on the principle of construing a grant most strongly against the grantor, he thinks it might. The question will depend, however, on the nature of the way, and the degree of possession necessary to its enjoyment. But the ungranted residue of a way may be, either expressly or by necessary implication, annexed to a messuage or close. Thus, where one lays out a court; by the sale of each house upon it, the grantor's own right is abridged; and with the sale of the last it ceases altogether, so that his entry may be lawfully resisted. And while he continues to own a part only, he can have only the privilege which he originally annexed to the property, and no greater right to use the court as a way to a messuage, &c., on the further side of it, than one of the grantees would have.(5)(b)

(1) *Morris v. Edgington*, 3 Taun. 24.

(2) *Howell v. King*, 1 Mod. 190; *Lawton v. Ward*, 1 Ld. Ray. 75; *Wright v. Ratray*, 1 E. 377; *Lazaretto, &c., Ashm.* 417; *Kirkham v. Sharp*, 1 Whart. 333; *Allen v. Gomme*, 11 Ad. & El. 759; *Cowling v. Higgin-*

son, 4 Mees. & W. 245; *Colchester v. Roberts*, Ib. 769; *Farley v. Bryant*, 32 Maine, 474.

(3) *Davenport v. Lawson*, 21 Pick. 72.

(4) Ib.

(5) *Kirkham v. Sharp*, 1 Whart. 333-4.

(a) Upon a similar principle, the owner (by prescription) of a private way, has no right to cut ditches for the improvement of his way, without the consent of the owner of the soil, unless he has acquired such right also by prescription. *Capers v. McKee*, 1 Strobb. 164.

(b) A, being the owner of land on the easterly side of Morton Place, conveyed a portion of the land to the plaintiff "with the privilege of using said court or passage-way, which, with the sidewalk, is about 30 feet in width, for the purpose of a passage-way, in common with all other persons, whose estates are bounded thereby or communicate therewith." A subsequently conveyed Morton Place to B and C, owners of land on the westerly side thereof. B and C conveyed portions of the land to the defendants, "with the right of passing and repassing,

72. It is said, if there be a way to a church, which is burned, and a theatre built in its place, there is no right of way to the latter.(1)

73. Conveyance of a strip of land, reserving the privilege of passing, for the sole purpose of repairing either of two adjoining estates, (belonging to the plaintiff and defendant.) The latter having built upon the land, held, the plaintiff could not recover, without averring an intention to repair, and that he notified the defendant, and was prevented from doing it.(2)

74. A prescriptive way for all manner of carriages does not imply a way for all sorts of cattle. And there may be a right of way *for agricultural purposes*, which is a qualified right, and does not necessarily authorize a user for general objects.(3)

75. Lord Mansfield has said, that where the grant of a way is not general, but of a precise, specific way; the grantor says, you may go in this particular line; but I do not give you a right to go either on the right or left.(4)(a)

76. If a way become impassable, whether the owner of the way may go over another part of the land, depends upon the question whether he was himself bound to keep the way in repair. And this he is bound to do, unless there is a prescription or express stipulation to the contrary. By the common law, he who has the use of a thing ought to repair it.(5)(b) And it is held, that where a way is granted, or acquired by prescription or necessity, between certain *termini*, the grantee cannot deviate from it, though impassable by overflowing or otherwise; or even by the acts of the owner of the land. His course is to abate

(1) Taylor v. Hampton, 4 McCord, 108.

(2) Hill v. Haskins, 8 Pick. 83.

(3) Ballard v. Dyson, 1 Taun. 279; Jackson v. Stacey, Holt, 455.

(4) Taylor v. Whitehead, Doug. 748.

(5) Bullar v. Harrison, 4 M. & S. 387; Doane v. Badger, 12 Mass. 65; Wynkoop v. Burger, 12 John. 222; Dygert v. Schenck, 23 Wend. 446.

draining, and all the usual easements on said Morton Place, not inconsistent with those of the easterly abutters." The defendants subsequently erected on their own land, but on the line of Morton Place, warehouses, with doors and windows opening upon Morton Place, and shutters projecting into the same, when open, and with sidewalks therein, having on their surface iron gratings for the admission of light to, and trap doors for communicating with, the underground apartments of the warehouses. In actions on the case, for obstructing the plaintiff's right of way by such erections; held, the parties must be presumed to be acquainted with the usages of the place, and to have created the easement with reference thereto; that the defendants had a right to make a reasonable use of the way in Morton Place adjoining their land; that the use which other persons, similarly situated, made of their land, was evidence of what was such reasonable use; and that, in erecting the structures complained of, it did not appear that the defendants had made any use of Morton Place, or had done any acts on their lands adjoining thereto, which were not justified by a common and well established usage in the city of Boston. Underwood v. Carney, 1 Cush. 285.

Where the owner of a block in a city makes partition of the same among several persons, and in each deed makes an alley running through the block the boundary of the lots, each proprietor becomes entitled to a private right of way in the alley, and to an action for its disturbance. Carlin v. Paul, 11 Mis. 32.

(a) Where the owner of land, and a person having a right of way over it, change the route or location of the way by mutual consent or agreement, it may be left to the jury to determine, whether such change was intended to be permanent, and for the purpose of substituting the new way for the old, or whether it was for a temporary purpose, and by mere permission of the owner of the land. In the latter case, the party using the new way would be a trespasser, if he should continue to use it after having been forbidden; but in the former case, it would be otherwise. Hamilton v. White, 4 Barb. 60.

(b) It seems, in case of *temporary* or *accidental* obstruction, the party may go out of the way. Holmes v. Seely, 19 Wend. 507. See Ellison v. Isles, 11 Ad. & El. 665. As to the prescriptive obligation of repairing a *highway*; Regina v. Blakemore, 9 Eng. L. & Equ. 541.

the nuisance. But if a way is undefined, and the owner of the land obstructs the way in use, the party may pass elsewhere.(1)

77. Trespass *qu. claus.* Plea, that, time out of mind, there was a footpath through the close. Replication, that defendant went in other places out of the way. Rejoinder, that the footpath was *adeo luteosa et funderosa* by default of the plaintiff, who ought to amend it; that the defendant could not pass along; therefore he went as near the path as he could, in a good and passable way. Held, a good plea and justification.(2)

78. Trespass *qu. claus.* Plea, a right of way by prescription through a lane of the plaintiff's, which the tenants of the *locus in quo* were bound to repair; that it was overflowed, and the defendant necessarily passed over the *locus in quo*. The plaintiff traverses the prescription to repair, and the right of way. Verdict for the plaintiff on the first plea, and for the defendant as to the second. A question arising upon the sufficiency of the latter; held, that the plaintiff had not undertaken to provide against the overflowing of the river; for aught that appeared, it might have happened through the neglect of the defendant, and that he had no right to go out of the way.(3)

79. Dragging timber from the land of one man upon that of another for the purpose of turning it round, is a *mis-user* of a right of way.(4)

80. The above-named rule does not apply, it seems, to ways of necessity, because the owner of such ways is not bound to repair them.(5)

81. And if a highway is impassable, being for the public service, it is for the general good that people should be entitled to pass in another line.(6)

82. It has been doubted, whether the erection of a gate across a private way, by the owner of the land, is, in law, an obstruction.(7) And it is held, that, notwithstanding the general grant of a right of way, between certain *termini*, over the grantor's land, the grantor has a right to erect gateways at the *termini*.(8)

83. If a highway is obstructed, any passenger may remove the obstruction, and may even enter upon adjoining land of the party in fault, for this purpose. But for any wanton destruction of property he is liable.(9)

84. Where the owner of a right of way purchases the land over which it passes, the way becomes extinguished by unity of possession.(a) But this principle does not apply to ways of necessity. Thus, in England, if a vill has a way to a church, and one of the vill purchases the land; this does not extinguish the way.(10)

(1) *Miller v. Bristol*, 12 Pick. 553; *Farnum v. Platt*, 8, 339; *Williams v. Safford*, 7 Barb. 309.

(2) *Henn's case*, W. Jones, 296.

(3) *Taylor v. Whitehead*, Doug. 745.

(4) *Comstock v. Van Deusen*, 5 Pick. 163.

(5) *Ib.*

(6) *Absor v. French*, 2 Show. 28; 3 Kent, 424.

(7) *Capers v. Wilson*, 3 McCord, 170.

(8) *Maxwell v. McAtee*, 9 B. Mon. 20.

(9) *Inhts. &c. v. McCulloch*, 10 Mass. 70; *Beardslee v. French*, 7 Conn. 125.

(10) *Surrey v. Piggott*, Noy R. 84; *Rider v. Smith*, 3 T. R. 766; *Heigate v. Williams*, Noy R. 119; *Shury v. Piggot*, 3 Bulstr. 340; *Jordan v. Atwood*, 1 Rolle's Abr. 936; *Grant v. Chase*, 17 Mass. 447-8; *James v. Plant*, 4 Adol. & Ell. 749; *Clayton v. Corby*, 2 Ad. & Ell. (N. S.) 613; *Onley v. Gardiner*, 4 Mees. & W. 496. See *Kenyon v. Nichols*, 1 R. I. 512.

(a) As to the distinction between unity of *seizin* and unity of *possession*, see *England v. Wall*, 10 Mees. & W. 699.

85. One purchases close A, to which is annexed a way of necessity, over close B. He then purchases B, and then C, adjoining A, and through which he may pass to A. He then sells B, not reserving a way, and afterwards A and C. The purchaser of A has still a right of way over B.(1)

86. The owner of a wood and a close, with a right of way time out mind over the latter to the former, sells the close, without reserving such right, and afterwards sells the wood. Inasmuch as, by the first conveyance he lost his own right of way, none passes by the second conveyance.(2)

87. It has been held, that a way thus extinguished may be revived by severance. Thus, where a man died, leaving one parcel of land, to which a right of way was formerly appurtenant, and another parcel, over which the way passed; and the former was allotted to one heir and the latter to another; held, without any mention of the way it was revived.(3)

88. It has been suggested that such severance creates a new way, instead of reviving the old one.(4)

89. But the above doctrine has been since denied. Thus, where the owner of the two estates devised them to two different persons, devising that one to which the right of way was annexed, *with the appurtenances*; held, although the word *appurtenances* was sufficient to pass an easement, yet, as the way was absolutely extinguished in the hands of the devisor, the word had nothing to operate upon.(5)

90. It is said, that the use of a way, for thirty years after such extinguishment, is sufficient to raise a presumption of a new grant or license.(6)

91. As a previous right of way is extinguished by unity of possession, so a right of way cannot be founded upon actual user, at a time when the estate on which it is charged, and that to which it is appurtenant, belong to the same person. If a passage *de facto* was used by the occupants of the latter over the former, it must have been merely by *permission* of the owner of both. The same rule applies, where one person occupies at the same time two estates under different landlords. No easement can in such case be derived from long use.(7)

92. In most of the United States, provision is made for the laying out of private as well as public ways, by public authority, upon the petition of a party interested to procure such way. In general, it would seem, the statutory provisions upon the subject create a new right; but in Maryland, whose statutes do not materially differ, as will be seen, from those of other States, the laying out of a private way is held not to create any new right, but only to provide an additional means of acquiring a right; hence, although a penalty is provided for obstructing such way, an action on the case still lies.(8)(a)

(1) *Buckby v. Coles*, 5 Taun. 311.

(2) *Dell v. Babthorpe*, Cro. Eliz. 300.

(3) *Jenk. Cent.* 1 Ca. 37; *Pomfret v. Ricraft*, 1 Saun. 323, n. 6; *Hazard v. Robinson*, 3 Mass. 276.

(4) *Brook's Abr. Extinguishment*, 15; *Manning v. Smith*, 6 Con. 289.

(5) *Whalley v. Thompson*, 1 B. & P. 371.

(6) *Keymer v. Summers*, Bul. N. P. 74.

(7) *Gayetty v. Bethune*, 14 Mass. 53; *Clay v. Thackrah*, 9 Carr. & P. 47.

(8) *Wright v. Freeman*, 5 Har. & J. 467.

93. In Massachusetts,(1) private ways may be laid out. Where four or more persons are proprietors of a private way or bridge, any three of them may take measures for organizing such owners into a *quasi* corporation, having power to appoint officers, assess taxes, &c. In Kentucky, *private pass-ways* may be laid out; in Arkansas, *cart-roads*; in Illinois, *cart roads*; in Rhode Island, *drift-ways*; in Delaware, Maine(a) and Connecticut, *private ways*. So, in New York and Michigan,(b) statutes provide that a way may be laid out for the benefit of the applicant, his heirs and assigns, and to be used only for a road.(2) In Michigan, the owner or occupant of the land may use the way, if he gave notice of his intention so to do, before the assessment of damages. In New Jersey,(3) a private road may be laid out from a person's land to mill, market, a public landing or public road.(c) The way shall be repaired by the party who petitions for it, and others who commonly use it. In the same State, a *by-road*, used as such, though not lawfully laid out, if obstructed, may be laid open as a private way. In Maryland,(4) private roads or ways may be laid out from farms, &c., to church, mill, market, ferries, court-houses and highways, but not through any garden, yard, orchard or meadow. The applicant is bound to repair such way. Another act provides for the laying out of a way to a quarry or mine. In Pennsylvania, private roads may be laid out from dwellings or plantations to a highway, or place of necessary public resort, or to a private way leading to a highway. In this State, it has been held, that a road of this description is to be distinguished from a mere right of way. The former is more inconvenient to the owner of the land than the latter. Hence, where A has a right of way over B's land, and A, with others, by petition procures a private road to be laid out over the same land, B is entitled to damages.(5)

94. In North Carolina,(6) a person may procure the laying out of a *cart or wagon way*, to a road, ferry, bridge or landing, which shall be free to all who travel on horseback, or in carts or wagons. In South Carolina, *private paths* may be laid out. In the same State, there is a class of roads called *settlement roads*. Such a way is spoken of, as be-

(1) Mass. Rev. St. 240-8; St. 1837, 27; 1842, 226; 1843, 261; 1853, 968.

(2) Illin. Rev. L. 544; 2 Pitt. Dig. 294; R. I. L. 287; 2 Smith's St. 610; Con. St. 301; 1 N. Y. Rev. St. 517; Mich. L. 395-6; Dela. St. 471-2; (Nelson, Ch. J., dissen.) Ark. Rev. Sts.; Kent v. Mountjoy, 3 B. Monr. 302.

(3) 1 N. J. L. 616-20-1.

(4) 1 Md. L. 567; Md. St. 1834, ch. 253; Ib. 1832, ch. 292. See Owings v. Worthington, 10 Gill & J. 283.

(5) Parke & John. 688; Ashm. 417; Pocopson, &c., 4 Harr. 15.

(6) 1 N. C. Rev. St. 546-7.

(a) In this State, *public range-ways* are also recognized, and it is held that lands reserved for public range-ways do not differ from other lands in regard to the right of the public to use them. Small v. Pennell, 31 Maine, 267.

(b) In this State, it has been doubted whether the constitution authorizes the laying out of a way over land of one man for the benefit of another. Reynolds v. Reynolds, 15 Conn. 83.

(c) This is not a private way at common law, but open to the public, and to be pleaded as a highway. Perrine v. Farr, 2 N. J. 356.

Upon an application for a private road, the judgment of the Court of Common Pleas is conclusive, as to the setting up of the advertisements according to law, but not as to the sufficiency of the advertisements themselves; and the Supreme Court will look into their contents, to see that they give notice to all concerned. Hoagland v. Culvert, 1 Spencer, 387.

The judgment of the court below, that the advertisements were signed in the proper handwriting of the applicant, is conclusive. Ib.

ing used *by the neighborhood*, by permission or acquiescence of the owner, rather than a public highway, that every one may pass. In that State, it is remarked, the old roads were laid out by accident or convenience, without public authority, and afterwards changed or discontinued as population increased, or convenience required. Every person is at liberty to make a road through unenclosed land, or to pass and hunt upon it; and such use will not be held adverse.(1) In Georgia, a *settlement road* or *private way*, or a *private path* from a settlement to a highway or landing-place, may be laid out on application of an individual.(2)

95. In Alabama,(3) where no part of a person's land touches the highway, the county court may lay out a private way, not more than fifteen feet wide, which the party applying for it shall be bound to keep open and in repair.

96. In Indiana, a cart-way may be laid out by public authority, not more than eighteen feet wide, to a plantation, dwelling or highway. The court may declare such way to be a common cart-way, and it shall be open to the public. The party applying for the way shall open it.(4)

97. In Pennsylvania, (if it can be done without inconvenience,) New Jersey and Indiana, the land-owner may erect swinging gates across the way; in North Carolina, gates or bars.(5)

98. The consent of the owner of land, to the laying out of a private road across it, may be presumed from his acquiescence, and the acquiescence of those deriving title from him, in the uninterrupted use of the road as a private road, by others, for upwards of forty years.(6)

99. Such consent will render the proceedings for laying out the road valid.(7)

100. The Pennsylvania act of June 13th, 1836, authorizing the laying out of private roads, is constitutional.(8) So the right of way, of necessity, exists in all cases, in which an individual owns land surrounded by other lands, excluding it from any public highway. The Missouri act of March 17, 1845, which provides a mode for establishing such right, is constitutional.(9) So an act of this nature has been held constitutional in Delaware.(10) But a statute in Georgia authorizing the courts to grant the right of private ways, but containing no provision for compensation to the land owner, was held unconstitutional and void.(11) So, in New York, a former statute of this nature was held unconstitutional.(12) A recent act(13) provides for an application to commissioners to lay out a private way, who are to call a jury to assess damages, and shall take into account the discontinuance of a public road, which raised the necessity of the private way.

(1) *Capers v. Wilson*, 3 McCord, 170; *Rowland v. Wolfe*, 1 Bai. 58-9; *Lawton v. Rivers*, 2 McCord, 452.

(2) *Prince*, 742-7.

(3) *Aik. Dig.* 357.

(4) *Ind. Rev. L.* 449.

(5) *Statutes ubi. supra.*

(6) *Miller v. Garlock*, 8 Barb. 153.

(7) *Ib.*

(8) *Pocopson, &c.*, 4 Harris, 15.

(9) *Snyder v. Warford*, 11 Mis. 513.

(10) *Hickman, &c.*, 4 Harring. 580.

(11) *Brewer v. Bowman*, 9 Geo. 37.

(12) *Taylor v. Porter*, 4 Hill, 140.

(13) *N. Y. Sta.* 1853, 307.

CHAPTER LXII.

WAYS. HIGHWAYS.

- | | |
|---|---|
| 1. How laid out; power how restricted. | whether in adjoining owner. |
| 2. Title to the soil remains in former owner. | 16. Conveyance bounded by highway. |
| 9. Privileges incident to a highway. | 21. Provisions in N. York and Indiana. |
| 11. Statutory provisions as to trees. | 22. Highway by <i>dedication</i> and <i>user</i> . Obstruction, abandonment, etc. |
| 12. Analogy between highways and rivers; title to the soil of the road, | 55. Way along banks of rivers. |

1. IN the United States, highways(*a*) are universally laid out by public authority. Provision is everywhere made for compensating the owner of land which is taken for this purpose; and the forms of proceeding are substantially similar in all the States.*(b)* In some of them, certain kinds of land are specially exempted from liability to be thus appropriated. In Massachusetts,*(1)* burying grounds cannot be thus used without consent. In Indiana,*(2)* a road shall not be made through an enclosure of one year's standing without consent, if a good way can be had elsewhere. In New York, a road shall not be laid out, without consent, through any orchard or garden, of four years' growth or cultivation; through buildings, fixtures, or erections for trade or manufacture, or yards or enclosures necessary thereto; nor through enclosed, improved or cultivated land, without the oath of twelve freeholders as to its necessity.*(3)(c)* In Maine, a highway may be located over land granted to a corporation for erecting an academy, and used for such purpose.*(4)(d)* In Massachusetts, a town-way cannot be laid out between high-water mark and the channel of a navigable river. Such way cannot be wanted for any of the common purposes of a road, and must necessarily more or less obstruct the passage of the stream. The principle is the same as that which prevents the laying out of a highway *across* a river, unless licensed by the legislature, and the erection of wharves and buildings, by an individual owner, below high water mark, in such way as to obstruct navigation. Landing places sometimes exist by immemorial usage on the banks, and perhaps on the

(1) Mass. Rev. St. 239. See St. of Georgia, 1842, 38; Me. Rev. St. 383.
(2) Ind. Rev. L. 446.

(3) 1 N. Y. Rev. St. 514.
(4) Trustees, &c. v. Salmond, 2 Fairf. 109.

(a) A *street* in a town or city signifies a public highway. Penny, &c. v. Philadelphia, 16 Penn. 79.

(b) See Alexander v. The Mayor, &c. 5 Gill, 383. A town cannot discontinue a highway, during pleasure, reserving the right to re-open it without paying damages. Such reservation is void, and the discontinuance absolute. Cheshire, &c. v. Stevens, 10 N. H. 133. To grade a street or alley already dedicated to public use, is not an exercise of eminent domain requiring compensation, if done skillfully and discreetly. Taylor v. The City, &c. 14 Mis. 20.

(c) But this prohibition does not apply, where, after notice of a contemplated road, a building is placed in the route of such road. Carris v. Commissioners, &c., 2 Hill, 443. See Clapper, 3 Hill, 458.

(d) So, in New Hampshire, land occupied by a building is not exempt from this liability. Peirce v. Somersworth, 10 N. H. 369.

shores, of creeks and rivers; but towns cannot create them as such, or as ways.(1)(a)

2. The location of a public way, over the land of an individual, gives to the public *an easement*, which the owner of the land cannot extinguish or interrupt. But, by a rule said to be settled ever since the time of Edw. IV, the soil and freehold still remain in the latter, and he may use the land, above or below, in any way consistent with the easement. Thus he may work a mine. So, also, he may sink a drain or water-course under the land, covering it securely. So he may recover the land in ejectment,(b) or (it seems) maintain trespass.(c) And when-

(1) *Kean v. Stetson*, 5 Pick. 492. See *Pearsall v. Post*, 20 Wend. 111.

(a) The mere fact that part of a town-way, laid out along navigable water, is below high-water mark, is no defence to an indictment for levying a nuisance in that part of the way which is above high-water mark. *Gloucester v. County, &c.*, 3 Met. 375.

(b) *Acc. Hancock v. Wentworth*, 5 Met. 446. It has been held in Connecticut, that though the public have a mere easement in a highway, yet this precludes individual possession. Hence the owner of the soil cannot recover possession, subject to the easement. This would involve the inconsistency of issuing an *habere facias possessionem* in favor of A, *subject to the possession* of B. Smith, J. examines the decision of Lord Mansfield, in *Goodtitle v. Alker*, 1 Burr. 133, that ejectment lies in such case, and supposes it to be founded in part upon the peculiar nature of this action in England, where it does not settle the title, but is merely possessory. He remarks, that the right to bring such action is not requisite to prevent an adverse occupant from gaining a title; for while the easement continues, the statute of limitations does not run. (*Doe v. Danvers*, 7 E. 321.) But in a later case in that State it is decided, that the proprietor of land adjoining a highway may have an exclusive possession and seizin of the soil of the highway, subject to the public easement; and, consequently, may be dispossessed and disseized thereof, subject to such easement. *Read v. Leeds*, 19 Conn. 182. Also that he has the usual remedies, by action of trespass or ejectment, to prevent encroachments, and to defend his rights against the adverse occupancy of another. *Ib.* In trespass *quare clausum*, it appeared that the *locus in quo* was in the public highway, south of the middle line; that in 1842 the defendant took a deed of the *locus in quo*, went into possession, set out trees, enclosed it partly by a fence, and had ever since used and occupied it exclusively and adversely. The plaintiff claimed title by virtue of a deed, executed in 1843, purporting to convey to him land bounded on the north by such highway. Held, 1. The plaintiff's grantor, at the time of executing the deed, was ousted by the entry and possession of the defendant, and such deed was therefore void, under the statute against selling pretended titles, as to the *locus in quo*; 2. That if the defendant, and those under whom he claimed, had, for more than fifteen consecutive years before the commencement of this action, been in the exclusive and adverse possession of the *locus in quo*, he had acquired a title thereto, as to individual rights, although the public easement still remained. *Read v. Leeds*, 19 Conn. 182. In South Carolina, trespass to try titles lies by A, owning land, against B, having a way over it. But the sheriff gives possession subject to the easement. *Stiles v. Curtis*, 4 Day, 330; *Jerman v. Mathews*, 2 Bai. 271; *Adams v. Emerson*, 6 Pick. 59. It is held, that ejectment will not lie for a street, unless the occupation thereof is *wholly inconsistent* with the public easement. *Adams v. Saratoga, &c.* 11 Barb. 414.

The same point, as to the nature of the title acquired by an appropriation for public uses has recently arisen in the case of *railroads*.

In New York, it seems that a railroad corporation, by proceedings duly taken under its charter, acquires the title to lands appropriated for the use of the road. *Munger v. The Tonawanda, &c.*, 4 Comst. 349.

And, therefore, where cattle escape from the enclosure of the owner, and stray upon the track of a railroad, they are trespassing upon the lands of the company. *Ib.*

But in Vermont, the charter of a railroad provided, that the company, upon complying with the conditions upon which they may take land for the use of their road, shall be "seized and possessed of the land." Held, this does not make them owners of the fee, but gives them a right of way merely. Hence, although the charter makes no provision as to maintaining fences upon the line of the road, the general law, in reference to the obligation of adjoining land-owners to maintain the division fences between them, does not apply, but the obligation rests primarily upon the company; and, until they have either built the

(c) It has been held otherwise in Massachusetts, with regard to a *town way*. *Mayhew v. Norton*, 17 Pick. 357.

ever the way is discontinued, the land reverts to him free of incumbrance. It is said to be a common practice for the owners of water-mills, or of sites for water-mills, to sink water-courses, for the use of their mills, in their own land under highways. In such cases, the party is bound to make and keep in repair a way over the water-course. If he does not, he may be indicted for a nuisance, and, upon conviction, the nuisance may be prostrated by filling up the water-course, if he shall not make a convenient way over it. If a highway, on the other hand, be located over water-courses, either natural or artificial, the public cannot shut them up, but may, if necessary, divert them, and erect bridges over them, which it will be bound to keep in repair.^(a) Upon the principle above stated, to an action upon a bond given for the conveyance of land, it is no defence, that a highway has been since located over the land. But this fact may be considered upon a hearing in equity, to reduce the damages. So it is no breach of the covenants of seizin and a right to convey, that a highway passes over the land.^{(1)(b)}

(1) *Cooke v. Green*, 11 Price, 736; 1 Rolles Abr. 392, B; 2 Inst. 705; *Lade v. Shepherd*, Str. 1004; *Grose v. West*, 7 Taun. 39; *Goodtitle v. Alker*, 1 Burr. 133, 143; *Corleyn v. Van Brundt*, 2 John. 357; *Jackson v. Hathaway*, 15, 447; *Makepeace v. Worden*, 1 N. H. 16; *Peck v. Smith*, 1 Conn. 103; *Witter v. Harvey*, 1 McCord, 67; 3 Md. L. 83; *Com. v. Peters*, 2 Mass. 127; *Perley v. Chandler*, 6, 454; *Fairfield v. Williams*, 4, 427; *Stackpole v. Healey*, 16, 33; *Robbins v. Borman*, 1 Pick. 122; *McDonald v. Lindall*, 3 Rawle,

495; *Whitbeck v. Cook*, 15 John. 483; *Mayor, &c. v. Steamboat, &c.*, Charl. 342; *Nicholson v. Stockett*, 1 Walk. 67; *John, &c., Streets*, 19 Wend. 659; *Doe v. Pearsey*, 7 B & C. 304; *Dyert v. Schenck*, 23 Wend. 446; *Trustees, &c. v. Auburn, &c.*, 3 Hill, 567; *Union, &c. v. Robinson*, 5 Whar. 18; *Wooster v. Butler*, 13 Conn. 309; *Rowe v. Granite, &c.*, 21 Pick. 344; *Bosley v. Susquehanna*, 3 Bland, 67; *Leavitt v. Towle*, 8 N. H. 96. See *Willard v. Newbury*, 22 Verm. 458.

fences, or paid the land owner for doing it, a sufficient length of time to enable him to do it, the mere fact that cattle get upon the road from the land adjoining, is no ground for imputing negligence to the owners of the cattle. *Quimby v. Vermont, &c.*, 23 Verm. 387.

In New York, upon the same principle with that above stated, where private property is taken for public use by a municipal corporation, in the exercise of the right of eminent domain delegated by the State, and the estate which the corporation is authorized to take is a fee-simple absolute, for which full compensation is made; the property does not revert to the owner, in case the use thereof for public purposes is discontinued. And property taken by such corporation, for an almshouse is not subject to the same rule, as property taken for a road by a turnpike company. *Heyward v. The Mayor, &c.*, 8 Barb. 486.

In Illinois, the title even to streets and alleys may revert to the original proprietor, on the destruction of the corporation, or on abandonment of the ground appropriated to them; but, until such reversion, the fee is out of the original proprietor. *Hunter v. Middleton*, 13 Illin. 50.

But when land is dedicated to the public for a particular purpose, it may be improved and controlled for such purpose, but not aliened or sold. *City, &c. v. Illinois, &c.*, 12 Ill. 38.

(a) See *Water-course*. Also, Mass. St. 1841, 205. If the owner of land over which a road passes, dig a raceway across it, and build a bridge, he is liable for any damage arising from want of repairs upon such bridge. *Dyert v. Schenck*, 23 Wend. 446.

(b) One owning the soil of a street, in a populous town, may lawfully erect buildings and fences on the line of the street, with doors and gates, which, when opened, will swing over it. So, in constructing such buildings, he may place the building materials and the soil dug from the cellar in the street, not improperly obstructing it, and removing them in reasonable time; or spread earth on the street, for the purpose of improving it as a way; or allow horses and carriages occasionally to stand in the street against or near a house. *O'Linda v. Lothrop*, 21 Pick. 292. But, in the city of New York, the city corporation take the legal title to the land of the streets, for all purposes of managing them as streets, prescribing the width of streets and side-walks, granting the use of parts of them for private purposes, and for the erection of sewers and vaults. *Drake v. Hudson, &c.*, 7 Barb. 508.

Owners of property on streets in a city have an interest in maintaining them in their integrity, but the right only extends to their use as public streets and highways, and does not give such owners any private or exclusive right in the enjoyment of them, different from that of other citizens. *Drake v. Hudson, &c.*, 7 Barb. 508.

3. The right of passage over a highway does not involve the right in any member of the community claiming the easement, to turn his cattle upon the road for the purpose of grazing. Hence, if the cattle pass from the highway upon adjoining land, though unfenced, the owner of the land may maintain trespass against the owner of the cattle. But if cattle, used in the making of a road, stray on unfenced, adjoining land, against the will of a person using them, trespass does not lie; as where the act is done in the necessary turning of the forward cattle (1)

4. It is said, the legislature might enact that the future location of highways should vest the ownership of the soil in the public, and compensate the owner accordingly. But, it is doubted, whether they could constitutionally divest such owner of any remaining rights, in the soil of a way previously laid out; as, for instance, by interfering with a fruit tree, which serves at once for ornament, shade and profit, and is no nuisance to the way. (2)

5. A conveys land to B, reserving a certain highway over the land, to be kept open forever. B conveys to C, bounding on the highway. The road is afterwards discontinued, and B brings a writ of entry against C, for the land over which it passed. Held, the clause in A's deed did not reserve to him a title to the soil of the highway, but was merely a declaration that the way was to continue, or intended to guard him from liability as for an incumbrance; that the soil passed to B, and, on the discontinuance of the road, he held it free from the public easement; but that having bounded on the road in his conveyance to C, B had no right to interrupt the use of it by C as a way. The defendant having pleaded *nul disseizin*, the demandant had judgment. It would have been otherwise, if the defendant had pleaded a special non-tenure claiming a mere right of passage. (3)

6. The town of Charlestown, after the great fire in that place, laid it out into new streets and squares. The legislature afterwards confirmed this laying out, providing a compensation to land-owners by appraisement, and prohibiting them from bringing actions for the recovery of the land or of damages. The town laid out streets over the land of A, compensating him therefor. Afterwards the legislature ceded to the United States land in Charlestown for a Navy Yard, the value to be ascertained by a jury. Land of A was taken and paid for. The inquest of the jury described his lots as *abutting* on the streets; and one lot, which had buildings upon it, *with the appurtenances*. Afterwards the town by vote granted the streets to the United States, A protesting at the town meeting against it, on account of his rights to the advantage of said streets. Held, by the first act of the legislature, A's right in the soil did not pass, but only a public easement, notwithstanding the clause prohibiting any action, the act being both at common law and by the constitution of Massachusetts in derogation of private right, and therefore to be construed strictly; that A's right to the soil did not pass by the inquest of the jury under the vote of the town, by virtue of the word *appurtenances*, because in general land cannot be appurtenant to land, and moreover the lots were described as abutting on the

(1) *Stackpole v. Healy*, 16 Mass. 33; *Cool v. Crommet*, 1 Shepl. 250. (See 1 Swift, 107; *Stevens v. Whistler*, 11 E. 51; *Dut.* 72.)

(2) *Stackpole v. Healy*, 16 Mass. 36-7.
(3) *Alden v. Murdock*, 13 Mass. 256.

street; and, the streets being discontinued by the cession of the town to the United States, that A regained his original title to the soil, over which they passed.(1)

7. It is said to have been the practice formerly in Connecticut, for the selectmen of a town to sell useless portions of a highway. But such conveyance is declared to be void.(2)

8. Upon the principle that the public does not own the soil of a highway; where a canal is laid out under an act of the legislature, which provides for the payment of damages to all *owners* of land through which it passes; the town, bound to maintain a road traversed by such canal, has no claim for compensation under the act. And, on the other hand, where a railroad is laid out over a highway, the owner of the soil over which the latter passes is entitled to compensation.(3)

9. The grant of a *turnpike*(a) privilege passes not only an easement for the road itself, but also so much land as is necessary for purposes connected therewith, as, for instance, for a toll-house, and a cellar under it; as also a well for the use of the family. But the owner of the soil may bring trespass against a servant of the corporation for taking the herbage upon the road. Thus where, before the turnpike was made, the soil consisted of marsh land, and the travelled part of the road was made by cutting up the sods of the contiguous marsh land on either side, the travelled part being raised and separated from the marsh on each side by a railing; so that no traveller could pass upon the land outside of the railing; held, the owner of the soil might maintain trespass against a servant of the corporation for cutting thatch upon this untravelled part of the road.(4)(b)

10. It is an indictable nuisance to continue within the limits of a turnpike, buildings previously erected there, though upon a part out of the travelled path, and from which a high bank was taken down, in order to erect them.(5)

11. In New York and Michigan, the owner of land, traversed by a highway, is especially authorized to set out trees, and to sue for any injury done to them. Such owner is declared to be proprietor of all

(1) U. S. v. Harris, 1 Sumn. 21.

(2) Barkhamsted v. Case, 5 Conn. 528.

(3) Millbury v. Blackstone, &c., 8 Pick.

473; Trustees, &c. v. Auburn, &c., 3 Hill,

567.

(4) Tucker v. Tower, 9 Pick. 109; Adams v. Emerson, 6 Pick. 57.

(5) Com. v. Wilkinson, 16 Pick. 175.

(a) A turnpike is a highway, and, as such, it is an indictable nuisance to obstruct it. Com. v. Wilkinson, 16 Pick. 175. A grant may be presumed from use, for a turnpike to pass over a highway. Penton, &c. v. Bishop, 11 Verm. 198.

(b) A town may dig the soil and use the timber and other materials, found within the limits of a highway, in a reasonable manner, for the purpose of making and repairing the road, or bridges upon it. Felch v. Gilman, 22 Verm. 38.

A surveyor of highways cannot appropriate any land without the bounds of the road. He has no authority to make a ditch through adjoining improved lands, for the purpose of having water turned off from the highway, however important to the public it may be to have it done; and for such an act the owner of the land may maintain trespass against him. Plummer v. Sturtevant, 32 Maine, 325.

Questions have recently arisen, in regard to the use of highways for the tracks of *railroads*. It has been held, that to allow a street in a city to be used for a railroad track, either upon its natural surface, or by tunnelling, is not a misapplication of it; provided, such use does not interfere with the free and unobstructed use of it by the public, as a highway for passage and repassage. Adams v. Saratoga, &c., 11 Barb. 414.

The temporary inconvenience to which the adjoining proprietors are subjected, while the work of excavation and tunnelling is going on, is *damnum absque injuria*, and will not entitle an individual to damages. Plant v. Long Island, &c., 10 Barb. 26.

trees standing or lying on the land, except those necessary for the repair of the highway or bridge.(1)(a)

12. Chancellor Kent says,(2) there is a perfect analogy between the ownership of the soil bounding a river not navigable, and that of the soil bounding a highway.(b) In each case, the right of property is presumed to extend to the centre of the stream or of the road, subject to the public right of passage.(c)

13. In Connecticut, the question, as to the ownership of the soil over which a highway passes, has been the subject of elaborate discussion, leading to different conclusions on the part of the several judges composing the court. Smith, J., was of opinion, that the fee of a highway belongs to the owner of the adjoining land, upon the presumption that he furnished the land used for such highway; and that in the transmission of the adjoining land through successive owners, the fee of the road passes as parcel of and appurtenant thereto; especially where the grantees are bounded on the highway.(3) Swift, J., adopts the same views. He remarks, that the proposition that *the adjoining owner* has the fee of the road, means the owner *at the present time*, not those who were proprietors when the way was laid out, or their representatives; nor does it make any difference, that ancient proprietors of towns *granted* the lands and *reserved* the ways; for the grant and reservation make one transaction, and pass the fee of the road. There may be cases where *the whole* of a man's land is taken for a way. But these are few, and do not vary the general principle. A conveyance, bounded on a river not navigable, passes the soil of the river as appurtenant. So an existing way passes under the head of appurtenances. Hence, the soil of a highway passes as appurtenant to adjoining land. A contrary principle would allow injuries to the soil, trees, &c., for which no one could sue; the heirs of ancient proprietors being generally unknown.(4) Baldwin, Reeve and Edmond, Justices, and Mitchell, Ch. J., did not concur in these views; but the whole court decided, that where the proprietors of a township more than a century before appropriated land for a road, laying out and selling adjoining land as bounded thereon, and the road had been used for nearly a century, but was now no longer needed, and inclosed by the owner, the adjoining proprietors could not maintain ejectment for the soil.(5)

(1) 1 N. Y. Rev. St. 525; Mich. L. 397-8.

(2) 3 Kent, 432. See *Webber v. Eastern*,
&c., 2 Met. 147.

(3) *Stiles v. Curtis*, 4 Day, 332-3; (8 Hen.)

7, 5.) See also, *Buel v. Clark*, 1 Root, 49;
Brown v. Freeman, Ib. 118.

(4) Ib. 336-7-8.

(5) Ib. 328.

(a) The same principle applies to a private way as to a highway, in regard to the ownership of the soil by an adjoining proprietor. Thus, where A and B, adjoining owners of land, have a right of way over a dam between them, if each owns to the centre of the dam, and A erects a gate or fence across it, B may have an action of trespass to try titles against him. *Jerman v. Mathews*, 2 Bai. 271.

(b) *Navigable streams* in the United States, are declared by Act of Congress to be highways. Gord. Dig. 318.

(c) There is another point of analogy between *highways by land and by water*. The legislature has authority to lay out, and to discontinue or change the course of a highway. So, also they may alter the direction of a river, where the public good so requires. *Spring v. Russell*, 7 Greenl. 290-1. A public canal or stream is a highway. *Bosley v. Susquehanna*, &c., 3 Bland, 65. See *Clay*, 594; *Miss. L.* 112; *Cox v. The State*, 3 Blackf. 196. Neither the riparian owner, the legislature of the State, nor the Congress of the United States, can interrupt the public use of a navigable river. 3 Blackf. 196.

14. The presumption, that owners of land upon opposite sides of a road own each to the centre, is inapplicable, where a different original ownership is proved.

15. A and B were adjoining owners of land over which a highway was laid out. A encloses, and occupies for twenty-eight years, a portion of the way not used, upon his own side. Held, his adverse possession did not extend beyond the enclosure, and that B still owned to the centre of the original highway.(1)

16. It is the general rule, that a conveyance of land, bounded on the highway, gives a title to the centre of the road, if the land belongs to the grantor, and unless it is expressly, or by necessary implication, reserved. Such reservation may arise from bounding the land on the side or edge of the road.(2) The question, whether in a conveyance of land abutting upon a highway, the highway does or does not pass, is said to be in all cases a matter of construction and intention merely, to be determined from the language and surrounding circumstances; but the presumption is, that the parties did intend to include the highway.(3) Thus, the owner of a village lot, bounded by a street, is *prima facie* the owner to the centre of the street.(4)

17. Tenants in common make partition of land traversed by a road, assigning to each the land on the respective sides of the road, and bounding each part by the road. Held, no intention appeared to divide a part of the land covered by the road, and therefore it remained undivided.(5)

18. A warrant to commissioners directed them to appraise and divide *all* the estate of the party named. Their return states an appraisal and division of *all*, describing each parcel, and those adjoining a highway as bounded on it. Held, the property of the road passed to the respective owners on each side.(6)

19. A conveys to B, by warranty deed, land traversed by a road, "saving and excepting said highway." The soil of the road passes, and B may have an action for the continuance of a building, erected before the conveyance, on a part of the road not travelled.(7)

20. The owner of a narrow strip of land, and also of land adjoining it on the north and south, conveyed to one person two lots, one of which was described as bounded south on a *street*, the other north on an *intended street*, meaning by *street* the above-mentioned strip of land. Held, the fee thereof did not pass, but a right of way did pass, by implication or by estoppel.(8)

20 a. So, where the owner of land conveys a lot by its number, according to a plan, which delineates a street with lots adjoining, the fee which the purchaser takes is limited to the lines of the lot as exhibited on the plan, and does not embrace any part of the street. The conveyance, however, gives him by implication or estoppel, a right of way

(1) Watrous v. Southworth, 5 Conn. 305; (Headlam v. Headley, Holt, 463. See Steel v. Prickett, 2 Star. 463; Doe v. Pearsey, 7 B. & C. 304; Loft, 358; Grose v. West, 7 Taun. 39.)

(2) Stevens v. Whistler, 11 E. 51; 3 Kent, 433; Peck v. Smith, 1 Conn. 103. (But see p. 37, sec. 5.) See also, Chatham v. Brainard, 11 Conn. 60; Champlin v. Pendleton, 13, 23; Johnson v. Anderson, 18 Maine, 76; Child v. Starr, 4 Hill, 369; Scrutton v. Brown, 4 B. &

C. 485; 8 N. H. 96; Russell v. Lode, 1 Greene, (Iowa,) 566; Adams v. Saratoga, &c., 11 Barb. 414.

(3) Buck v. Squires, 22 Verm. 484.

(4) Adams v. Rivers, 11 Barb. 390.

(5) Sibley v. Holden, 10 Pick. 249.

(6) Bucknam v. Bucknam, 3 Fairf. 463.

(7) Peck v. Smith, 1 Conn. 103; Hart v. Chalker, 5, 311.

(8) O'Linda v. Lothrop, 21 Pick. 292.

in the street, and any erection made upon the street, by which his use of it for a passage-way is obstructed, is an invasion of his right; and, until an easement in the street has been acquired by the public, he may treat such invasion as a private nuisance, and maintain an action for the damage.(1)

20 *b*. But where the proprietor of land grants a private way across it, of a specified direction and width, and afterwards conveys the land on one side of such way, bounding it by the line of the way; it seems the grantee of such land takes no fee in any part of the strip of land covered by the right of way. Nor by virtue of his deed, does he take in such strip any easement or any right of way by necessity.(2)

20 *c*. Where a lot conveyed by deed is described as bounded "south-erly on the northerly line or side of T B's lane," the grantee cannot claim to the middle of the lane; especially if the lengths of the sides of the lot limit it to the northerly side of the lane.(3)

20 *d*. The grant, in such deed, of the use and privilege of the lane, until the mayor, &c., should cause streets to be opened through or adjoining the lot, is evidence of an intent not to grant the title to the middle of the lane.(4)

21. In the city of New York, where one sells land bounded on a street, as laid down upon a plan of lands belonging to the city or to the vendor; this reference to the plan is held a dedication of a street to the public, and, whenever it is opened, the vendee has a perpetual right of passage, by virtue of an implied covenant, though the fee remains in the vendor. In Indiana, the designation of a street, upon the recorded plat of an incorporated town, amounts to a grant of a highway. But where there is an exclusive grant to a corporation, and the street lies upon a river, this does not pass such a right to the soil, as authorizes the establishment of a ferry under the statute,—for such ferry requires ownership of the land. In the same State, it is said, a public street in a town is a public highway.(5)(*a*)

22. A highway may be created by a *dedication* on the part of the owner of the land to the public use.(*b*) Such dedication may consist

(1) *Sutherland v. Jackson*, 32 Maine, 80.

(2) *The State v. Clements*, 32 Maine, 279.

(3) *Jones v. Cowman*, 2 Sandf. 234.

(4) *Ib*.

(5) *Lewis Street*, 2 Wend. 472; *Livingston v. Mayor, &c.*, 8, 85; *Wyman v. Mayor, &c.*,

11, 486; *Cincinnati v. Lessee, &c.*, 6 Pet. 431; *Trustees, &c. v. Cowen*, 4 Paige, 510; *Conner v. President, &c.*, 1 Blac. 44; *Thirty-second, &c.*, 19 Wend. 128; *Twenty-ninth street*, 1 Hill, 189.

(*a*) As to the boundaries of a highway, see *Hannum v. Belchertown*, 19 Pick. 311; *Stetson v. Faxon*, *Ib*. 147; *Sprague v. Waite*, 17, 309.

(*b*) A *wharf* may be dedicated in like manner, and no toll can afterwards be imposed upon the use of it, but by authority of the legislature. *Wharf case*, 3 Bland, 361.

But not a right to float logs in a stream for two or three weeks of the year, during the spring freshets, thereby endangering and injuring the dams and factories and mills thereon; this not being in its nature a public right. *Munson v. Hungerford*, 6 Barb. 265.

In 1795, the proprietor of the town of Newport, Ky., deeded a certain square to the justices of C county, as a public square, to be appropriated as they might think proper, for the use of public buildings. In 1840, the county seat was removed from Newport, and the justices leased the public buildings to private persons. Held, there was a dedication of the square to the use of the public, and the justices could not appropriate it to private uses. *C. C. Court v. Newport*, 12 B. Mon. 538.

A deed of land to a town in fee is not a dedication of the land to the public use, although it be expressed that the land is conveyed for the use of the town as a meeting-house green. *State v. Woodward*, 23 Verm. 92.

in a simple acquiescence, or in positive and unequivocal acts or declarations, signifying the owner's intention to give up the soil to this object. The statute of frauds does not apply to the case. No particular form or ceremony is necessary, if the intention appear. It is said, the doctrine of such dedication rests on the principle of the common law, that, where a person has made representations, or pursued a line of conduct, with a view to induce others to adopt a particular course of action, and such representations or conduct have produced that effect, they shall be held to be binding and conclusive against him; and he shall not afterwards be permitted to retract or repudiate them, to the injury of those who have been induced thus to act. The time requisite for the establishment of the public right has been variously fixed in different cases; in some, the periods of six and twelve years having been held sufficient, while in others even nineteen years' use has been considered as not conclusive. (*Infra*, sec. 114.) And in a case where the land was under a lease for years, ninety-nine years were held insufficient to bind the owner in fee. Chancellor Kent is of opinion, that where there is mere acquiescence on the part of the owner, his right will not be concluded, by dedication to the public, by a use for any period short of twenty years; but a less period will be sufficient where there is any positive assent or permission on his part, showing an intention permanently to abandon the soil. Use of the way is evidence of an intention in the owner to dedicate it; and interruption of such use rebuts the intention: as where the circumstances show only a temporary and conditional *license*.(1)

23. Forty years before suit, the grantor of the defendant and his neighbor opened a lane or road upon their boundary lines to accommodate the adjoining lands, taking ten feet from each side. The road thus opened was used uninterruptedly by the public thenceforth, until shut up by the defendant the year before the trial. In 1848, the commissioners of highways ascertained, described and entered such road upon record. In 1826, the commissioners had surveyed, laid out, and recorded, and made to connect with the lane or road in question, the road beyond, on which inhabitants resided who had no other egress.

(1) *Baxter v. Taylor*, 1 Nev. & M. 13; *Trustees, &c. v. Merryweather*, 11 E. 375, n.; *Com. v. Miltenberger*, 7 Watts, 450; *Wood-ger v. Hadden*, 5 Taun. 125; *Wood v. Veal*, 5 Barn. & Ald. 454; *Rex v. Lloyd*, 1 Camp. 260; *Lethbridge v. Winter*, Ib. 263, n.; *Rex v. Inhabitants, &c.*, 4 Barn. & Ald. 447; *Jarvis v. Dean*, 3 Bing. 447; 3 Kent, 450; *Willoughby v. Jenks*, 20 Wend. 96; *Lessee, &c. v. Commissioner, &c.*, 7 Ohio, 88; *Leba-*
non v. Warren, &c., 80; *Barraclough v. John-*
son, 8 Ad. & Ell. 99; *Poole v. Huskinson*, 11
Mees. & W. 827; *State v. Johnson*, 11 Ired.
 647; *Dwinel v. Barnard*, 28 Maine, 554;
Penny, &c. v. Philadelphia, 16 Penn. 79;
Stacey v. Miller, 14 Mis. 478; *Colden v. Thur-*
bur, 2 John. 424; *Pritchard v. Atkinson*, 3
 N. H. 335; *State v. Campton*, 2, 513; *Barker*
v. Clark, 4, 380; *Godfrey v. City, &c.*, 12
 Illin. 29.

But if, after accepting such a deed, the town suffer the land to remain unenclosed, and place a survey of it, describing it as part of the common, upon record, and then permit an uninterrupted use of it by the public for more than fifteen years; this will amount to a dedication of the land to the public, which is irrevocable. Ib.

In Illinois, the acknowledgment and recording of a town plat vests the legal title to the ground, appropriated to streets and alleys, in the corporation of the town, for the uses and purposes of the public. *Hunter v. Middleton*, 13 Ill. 50.

The person making such plat and dedication, not having the legal title nor exclusive right of possession, cannot bring an action of trespass for an injury to the soil or freehold, as in the case of highways. Ib.

By Statute of 1851, p. 111, land may be dedicated in perpetuity for *cemeteries*.

Held, that there was sufficient evidence of a dedication to the public, upon which the public and individuals had relied; and of an adoption of such road by the proper authorities.(1)

24. Where there was sufficient evidence of the dedication and acceptance of a street as a public way, a person having purchased a farm adjoining the road many years after the dedication, and having acquiesced in the use of the road by the public for twenty-two years, and then obstructed the same by building a fence through the centre thereof, was held liable for such obstruction, in an action at the suit of the commissioners of the highways.(2)

25. Where a public road had been opened and recognized by the public and the owner of the fee, and courts having jurisdiction over roads, as such, for 25 years; held, the owner of the fee could not maintain trespass against one who peaceably removed obstructions from the road, the facts raising a presumption of dedication.(3)

26. One who has sold and conveyed land, and at the same time taken a reconveyance of it to himself by way of mortgage, which is afterwards foreclosed, is to be deemed the owner, so far as relates to a dedication.(4)

27. In 1839, a way was laid out for a private way. In 1840, the street commissioner reported that it was open, unpaved, and could not be kept in repair. In 1841, he made a similar report, and said the way was a public nuisance, whereupon the city council ordered it paved, which was done. In an action against the party who laid it out, for his share of the assessment for paving; held, his acts constituted a dedication.(5)

28. Where a passage-way, leading from one part of the public road to another, though circuitous, had been many years used by the public; held, a dedication.(6)

29. The owner of land abutting on a street in Boston, laid out as a town-way, set his building back from the line of the street, thus leaving an open strip of land, which was used by the public as a part of the street for more than forty years. Held, the public or the city had acquired a right of way over this strip.(7)

30. But where a way had been used by the public many years, and was paved, lighted, and mentioned as a public way by act of Parliament, but was no thoroughfare, and led only to lands under lease; held, the landlord was not bound without privity or dedication.(8)

31. A constant use by the public, for thirty years, of a private way leading to a wharf, contemporaneous with a like use thereof by the owner, to whom the city continued to assess the taxes on the land, and who, during all that time, paid the taxes, made all necessary repairs at his own expense, stowed lumber and other articles on the land, and did other acts of ownership; will not authorize the presumption of a dedication of the land to the public for a highway.(9)

32. The mere fact, that a farmer suffers the public to pass through his farm for fifteen years, is not sufficient evidence of an intention to

(1) *Wiggins v. Tallmadge*, 11 Barb. 457.

(2) *Id.*

(3) *Elliott v. Treadway*, 10 B. Mon. 22.

(4) *Wright v. Tukey*, 3 Cush. 290.

(5) *Gamble v. City, &c.*, 12 Mis. 617.

(6) *Rex v. Lloyd*, 1 Campb. 260.

(7) *Valentine v. Boston*, 22 Pick. 75.

(8) *Wood v. Veal*, 1 D. & R. 20; 5 B. & A. 454.

(9) *Irwin v. Dixon*, 9 How. U. S. 10.

dedicate a way to the public.(1) So, proof that a way has been used as a road for more than 30 years, encumbered all the time with gates and bars in the summer seasons, without its ever having been fenced on its sides, is not sufficient to show that it is a "public highway."(2)

33. The proprietors of real estate in L laid out and constructed a street through the same, in the usual manner; with a carriage-way in the centre, of the ordinary width; after which, the street was and continued to be used by the public, without obstruction or objection. They afterwards conveyed a portion of the land, including a part of that over which the street was laid out, to the defendants, with a provision in the deed, that the street should be forever maintained as a road, for the common use of the parties to the conveyance, their successors and assigns, the grantees severally keeping in repair those parts which passed over their respective estates. The proprietors subsequently conveyed to the plaintiff a lot bounding on the street and so described, with all the privileges and appurtenances; and then sold at auction all their remaining lands on said street, together with other lands, declaring in the printed conditions of sale, that all the streets mentioned therein (including the street in question) should be reserved and kept open, for the benefit of the abutters; but that any of them which were not graded might be altered or discontinued, with the consent of the abutters thereon. The city afterwards laid out that part of the street on which the plaintiff's lot was bounded, as a public highway. Held, no intention on the part of the proprietors, to dedicate the street in question to public use, could be inferred from these facts, and that the plaintiff had a right of way in that part of the street not laid out by the city, for an obstruction of which by the defendants, he might maintain an action on the case.(3)

34. Where several roads traverse a common, or unenclosed land, in the same general direction, but in different places, at the pleasure of the passengers, this is not satisfactory evidence of a dedication, unless, in respect to some one of the roads, the enjoyment and use have been uniform and uninterrupted for 20 years.(4)

35. In England, where the owner of land used as a public way does not intend to dedicate it; it is customary to shut it up one day in the year. If there is an old way, and the fences decay, and the public pass over the land, there is no dedication. So the erection of a bar by the owner, though knocked down, rebuts a dedication.(5)

36. Where a way had been used twenty-seven years, but the owners of the land during that time had maintained gates across it; held, not evidence of an ancient laying out, or grant by the proprietors of the soil.(6)

37. To establish a highway by dedication, there must be not only an intent on the part of the owner of the land to devote it to the use of the public, but there must also be an acceptance on the part of the public; and to establish such acceptance by use, that must be clearly proved.(7)

38. A statute of Rhode Island provided, (R. I. L. 289,) that, where a

(1) *Stacey v. Miller*, 14 Mis. 478.

(2) *State v. Stroug*, 25 Maine. 297.

(3) *Bowers v. Suffolk, &c.*, 4 Cush. 332.

(4) *The State v. Thomas*, 4 Harring. 568.

(5) *British &c. v. Finnis*, 5 C. & P. 460;

Roberts v. Carr, 1 Campb. 262, n.

(6) *Com. v. Newbury*, 2 Pick. 51.

(7) *Remington v. Miller*, 1 R. I. 93; *Curtiss v. Hoyt*, 19 Conn. 54; *The State v. Carver*, 5 Strobl. 217.

road has been improved twenty years, it becomes a highway, if declared such by the town council; so also, that a deed of land to a town for this purpose constitutes it a highway. Under this statute, the fact, that a town council has declared a way to be an open highway, and has ordered it to be repaired at the expense of the town, is not evidence of an acceptance by the public, because the town council are not to be deemed the general agents of the public. In no case is such a declaration by a town council of any binding force, unless the way has been actually used as a highway for twenty years.(1)(a)

39. But, under the statute in question, if a town council adjudge a highway over certain land to be necessary for the public use, and thereupon proceed to appoint a committee to survey, bound, and mark out a highway over said land, and to establish it, the intent of the owner of the land to dedicate it for a highway would have been met by an authorized act.(2)

40. An acceptance of a highway dedicated to the public may be made at any time, provided the gift continues and the tender is not withdrawn by the owner of the fee before an actual acceptance.(3)

41. It is not essential to a valid acceptance by user, that the entire width of the way dedicated should be travelled. The fact, that there is a travelled path through such way, shows an intention of the public to accept the whole way.(4)

42. Where acts are done by the owners of land, which manifest an intention to dedicate it as a highway, acts of appropriating money or labor to the making or repair of such way, by the town or city, manifest an intention to accept the dedication, and render the place a complete highway.(5)

43. Where a particular place, claimed to be a public highway, had never been opened, or worked, or used as a public highway; held, that it could not be proved a highway by parol.(6)

44. With regard to the time for which user of a way must be continued in order to constitute an implied dedication, the general doctrine has been already stated. (Sec. 22.)

45. Different rules seem to prevail in different States. In Massachusetts, user of a way for six years by the public is not sufficient to establish an easement therein. But, if a way be known and used as a highway forty years, and repaired by the town; it is a highway.(7) So, the

(1) Ibid.

(2) Ibid.

(3) *Simmons v. Cornell*, 1 Rhode Island,

519.

(4) Ibid.

(5) *Wright v. Tukey*, 3 Cush. 290.

(6) *Harrington v. The People*, 6 Barb. 607.

(7) *Hinkley v. Hastings*, 2 Pick. 162; *Reed v. Northfield*, 13 Pick. 94. See *Hull v. Richmond*, 2 W. & Min. 337.

(a) It has been held in Indiana, that a dedication of lands to public use, good at common law, is not avoided by non-compliance with the act of 14th January, 1824, providing a mode in which lands may be so dedicated. *Sargeant's, &c. v. State Bank, &c.*, 4 McLean, 339.

So in Kentucky, where no order of the county court, establishing a road, is produced, and when, upon diligent search in the clerk's office, none can be found, it will be presumed, after thirty years' of continued use of the road as a public highway, that it was established by law. *Elliott v. Treadway*, 10 B. Mon. 22.

So in Illinois, the public may have an interest in streets and alleys, although the ground has not been dedicated in the manner prescribed by statute. *Manly v. Gibson*, 13 Ill. 308.

A dedication of ground to public uses may be made in other ways, than by making and recording a town plat. Ib.

erection and support of a bridge by a town, and the use of it by the public for thirty-eight years, are sufficient proofs of its existence as a highway.(1)(a)

46. In Rhode Island, (as has been stated, sec 38,) where a road has been improved twenty years, it becomes a highway, if declared such by the town council. So a deed of land to a town, for this purpose, constitutes it a highway.(2)

47. In Pennsylvania, by a statute of 1782, it is provided that, where buildings have been so erected as to encroach upon the streets, no length of time for which they may remain, shall prevent their being treated as nuisances.(3) In North Carolina, twenty years' use establishes a highway by dedication.(4) So in South Carolina.(5)

48. The question has been made, whether there may be a *partial* dedication of a highway to the public—as, for instance, for foot-passengers, for horses, and not carts, or for carts, except those carrying coal. In one case,(6) it was held that there can be no partial dedication, though a mere footway may be granted. Where the owner of land allowed a public use of the land for several years, except for carrying coals; this was held to constitute either a limited dedication, or none at all, but a mere revocable license; and one carrying coals over the land, after notice, was adjudged a trespasser.(7) This case favored the principle of a partial dedication. But there can be no dedication, reserving a right to make cuts for drainage.(8)(b)

49. In Massachusetts, the doctrine upon the subject under consideration, has been somewhat variable. It has not been doubted, that *highways* might be established by *user* or dedication, as well as a legal laying out by public authority.(9) But it was formerly doubted, whether a *town-way* could be established otherwise than by a regular laying out, according to the statute.(10) It was said, that if the inhabitants of a town acquire a right of way by user, upon the presumption of a grant, it will be technically a *private* way; no indictment will lie for its obstruction, or against the town for a neglect to repair; and any one but

(1) Williams v. Cummington, 18 Pick. 312.

(2) R. I. L. 289.

(3) Purd. Dig. 886.

(4) Woolard v. McCullough, 1 Ired. 432.

(5) State v. Sartor, 2 Strobb. 60.

(6) Roberts v. Carr, Lethbridge v. Winter, 1 Camp. 263, u.

(7) Marquis, &c. v. Coyney, 7 Barn. & C. 257.

(8) Rex v. Leake, 2 N. & M. 595; Gowan v. The Philadelphia, &c., Law Rep. July, 1843, p. 103; Joaquim v. Eslava, 9 Por. 527.

(9) Com. v. Low, 3 Pick. 412.

(10) Com. v. Newbury, 2 Pick. 57; 3, 412.

(a) On the trial of an indictment for a nuisance in a road, caused by digging a ditch across it, the defendant introduced evidence that, at a remote period, a similar ditch, useful for draining certain meadow lands, was in the same place, and had been afterwards filled up; and he contended, that the nuisance, with which he was charged, was the mere removal of a pre-existing nuisance. Held, that if the road had been used more than forty years, without the incumbrance of the ditch, the right to reopen it had been lost. Com v. Belding, 13 Met. 10.

(b) Nor can a dedication be limited to a particular portion of the public—as to the inhabitants of a certain parish. Poole v. Huskinson, 11 Mees. & W. 827; Penny, &c. v. Philadelphia, 16 Penn. 79. There may be a special dedication of part of an owner's ground, to enhance the value of the rest, without parting with the control of it, or entitling an adjoining owner to share in the benefit, by using the part dedicated for passing to his door. Hence, the former may obstruct the door-way, by a wall before the door. Gowan v. Philadelphia, &c., 5 Watts & S. 141. One may release what land shall be wanted for a railroad, provided it does not interfere with certain buildings, and thus make a qualified dedication. Rathbone v. Tioga, &c., 2 W. & S. 74. Where a bridge was built as a carriage-way, exclusively for the use of particular tenants; it was still held to be dedicated to the public, if, from the acts of the owners, the public so supposed. Grand, &c. v. Hall, 1 Mann. & G. 392.

an inhabitant, passing over it, will be a trespasser. If such way is used exclusively by the inhabitants of the town, the user establishes it as a private way; if in common with those of other towns, it is a public highway.(1) Late cases(2) have decided, that a town-way may be established by dedication and public assent, or by prescription and the presumption arising from use and enjoyment. So, that the proper laying out of a town-way, in distinction from a public highway, may be presumed by a jury from long user and occasional repairs, with other circumstances tending to show that the way was originally laid out as such way.(3) But a statute (1846, p. 389) now provides, that no town or city shall be chargeable with any way not regularly laid out, nor already become a public way; nor be liable for damage caused by any defect, if such way be closed up, or notice given of its being dangerous. And it seems, no public way can now be established by dedication merely, and without the assent, express or implied, of the city or town, which will be bound by law to keep the same in repair.(4)

50. Where a town has suffered its land to lie open for the general convenience, an inhabitant cannot claim a prescriptive right of way over the land; because his *user* has been by favor and indulgence, and not adverse. And, it is said, in Massachusetts, the passing over a training field or open common is no uncommon usage, and, however long it may continue, will not convert a field or common into a public highway.(a) Hence, where, by an ancient vote of the town, all the common lands, including the land in question, were to remain unfenced for *highways*, a training field, and other specified purposes; and witnesses testified that the land in question was *common land*; it was held that a defendant could not justify passing over the land as a highway, in a suit brought by one who claimed it under a parish of the town, by virtue of an enclosure subsequent to the original vote.(5)

51. With regard to the *abandonment* of a highway, once established, or the *revocation of a dedication* once made, the following cases are in point:

52. A party, indicted for obstructing a road, gave evidence, that when he obstructed it, he opened a new and convenient way on his own land, which was used for seven or eight years, and until a bridge, which he built in the new way, was carried off by a flood. Held, such evidence did not show an abandonment of the old road, nor furnish any defence to the indictment.(6)

53. It has recently been decided, that a dedication of land to a public street, accepted and acted upon by the public since 1806, cannot be revoked, so long as it remains in public use as a street.(7)

(1) *Com. v. Low*, 3 Pick. 408.

(2) *Hobbs v. Lowell*, 19 Pick. 405; *Stedman v. Southbridge*, 17 Pick. 162; *Valentine v. Boston*, 22, 75.

(3) *Commonwealth v. Belding*, 13 Met. 10.

(4) *Bowers v. Suffolk, &c.*, 4 Cush. 332.

(5) *Inhabitants, &c. v. Beach*, 2 Pick. 60; *Emerson v. Wiley*, 7 Pick. 68.

(6) *Com. v. Belding*, 13 Met. 10.

(7) *Adams v. Saratoga, &c.*, 11 Barb. 414.

(a) The distinction between commons and highways, as the subjects of ancient statutes in Massachusetts, is noticed in *Stackpole v. Healy*, 16 Mass. 35-6. The earliest provisions, relating to commons, did not extend to ways; but common lands, being frequently open, though, it would seem, generally both enclosed and cultivated, came at length to be regarded as ways, and coupled with them in statutory provisions. The grant of a common, unlike that of a way, is said to *pass the soil*. *Wellington, &c.*, 16 Pick. 99. (See *Cedling v. Johnson*, 9 B. & C. 933.

54. In 1690, Vine street, from Front street to the River Delaware, in the city of Philadelphia, having been dedicated to public use, as a street of the increased width of one hundred feet, or more, by the act of the commissioners of property; the right of adjacent lot holders, as well as the public, to the street so enlarged, is a vested right of which they cannot be divested by any subsequent act of the proprietary.(1)

55. Chancellor Kent makes some interesting observations upon the question, whether the public have a right of way along the banks of navigable rivers, more particularly for the purpose of *towing*. By the civil law this right exists, in connection with the common right of navigation in the rivers themselves; and the early authorities in the English law adopt the same doctrine. Sir Matthew Hale, however, annexes the qualification, that a reasonable compensation be paid to the owner. And, in a modern decision, it is solemnly adjudged, that the right in question does not exist.(2)(a)

(1) Penny, &c. v. Philadelphia, 4 Harris, 79. | R. 253; Rex. v. Tippet, 3 B. & A. 193;
(2) 3 Kent, 425-6; 1 Ld. Ray. 725; Harg. | Hanson v. City, &c., 18 Louis, 295.
Law. Tracts, 85-6-7; Ball v. Herbert, 3 T.

(a) So, in New York it is held, that the banks of rivers cannot be used as landing-places and deposits of property *in transitu*, even though thus improved for twenty years, with the knowledge of the owner. Pearsall v. Post, 20 Wend. 111; 22, 425. But in Missouri, they may be leased, transiently and under restrictions, by navigators and fishermen, for landing and repairing their vessels, and exposing their sails and merchandize. O'Fallon v. Daggett, 4 Misso. 343.

With regard to the *obstruction* of highways, the general rule is, that being a *public nuisance*, it can be judicially noticed only by indictment. It is otherwise, however, where an individual sustains special damage. Thus, A erected a warehouse, projecting several feet into the street, and beyond B's warehouse, standing near on the line of the street, whereby the latter was obstructed from the view of passengers, the travel diverted from it, it became less desirable as a place of business, and the rent was reduced. Held, B might maintain an action against A. Brooks v. Boston, 19 Pick. 174.

In Pennsylvania, by a statute of 1782, it is provided that, where buildings have been so erected as to encroach upon the streets, no length of time for which they may remain shall prevent their being treated as nuisances. Purd. Dig. 886. In Connecticut, fifteen years' possession of a prescriptive highway, by an individual, has been held to bar the right of a town. Canday v. Lambert, 2 Root, 173; Litchfield v. Wilmot, Dut. 72. See Russell v. Stocking, 8 Conn. 236. Ingraham v. Hutchinson, 2, 584; Watrous v. Southworth, 5, 305; Beardslee v. French, 7, 125.

In Rhode Island, where a portion of a highway, traveled by the public, was enclosed and occupied as private property more than 20 years; held, the statute of limitations did not run against the State, the enclosure having commenced as a public nuisance, for which there can be no prescription. Simmons v. Cornell, 1 R. I. 519.

But in Vermont, if land within the surveyed limits of a highway be enclosed by an individual, and occupied by him constantly for more than twenty years, under a claim of right, he will acquire a prescriptive right as against the public, and can maintain trespass against the selectmen who remove his fence to the original line of the highway. Knight v. Heaton, 22 Verm. 480.

In Massachusetts, individuals acquire no right of possession adverse to the owner of the soil, by long use of that part of a public road not occupied as a traveled path. Parker v. Framingham, 8 Met. 260. So, the erection of a pound by a town, upon the highway, is an encroachment upon, but does not destroy, the easement. Sprague v. Waite, 17 Pick. 309.

CHAPTER LXIII.

FRANCHISES.—FERRIES.

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| <ol style="list-style-type: none"> 1. Franchise—definition. 2. Ferry, what it is, and how established. 4. How affected by the title to the waters. 5. Privilege of a ferry; its nature and extent; doctrine in different States. | <ol style="list-style-type: none"> 20. Question of public convenience, &c. 21. Ownership of the land adjoining a ferry; landing-places, &c. 24. Statutory provisions. |
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1. A *franchise*, in England, is a royal privilege or branch of the king's prerogative, subsisting in a subject by a grant from the crown.(1) A more appropriate American definition is, that franchises are certain privileges conferred by grant from government, and vested in individuals.(2)

2. At common law a ferry is deemed a franchise, which cannot be set up without the king's license.(a) In Massachusetts, (and most if not all the other States,) it is regulated by statute. It is said, though a ferry be in its nature part of a highway, yet it is in many respects distinguishable; and, from the earliest times of the colonial government, the mode of establishing ferries, and that of laying out highways, have been kept distinct. No statute, in Massachusetts, regulating the licensing of ferries, requires a jury, nor can it be necessary, for no property is taken. If a highway is required as incident to the ferry, another tribunal is provided for laying it out. The *termini* of a ferry are at the water's edge; and if one ferry interferes with the rights of others, the common law furnishes a remedy.(3)(b)

3. So, in Maine, it is said, the right to keep a ferry, is, in England, an incorporeal hereditament, being a franchise granted by the crown, or depending upon prescription. The party entitled to the franchise has imposed upon him by law certain duties, incurs certain liabilities, and has a remedy against any one who, without right, interferes with his profits, or disturbs him in the enjoyment of his property. Ferries received the attention of the colonial government of Massachusetts soon after its first settlement. As early as 1641, (Col. & Prov. L. 110,) which was only thirteen years after the date of the first charter, an act passed relating to ferries; but how granted, for what periods, or by what tenure, does not appear. They were probably set up and licensed from time to time, as the public convenience required, by the towns or other colonial authorities. By the Provincial Statute of 7th Wm. III, it was provided that no person should thereafter attempt to keep a ferry,

(1) 2 Black. Com. 37.

(2) 3 Kent, 458. See *Thompson v. People*, 23 Wend. 537.

(3) *Fay, &c.*, 15 Pick. 249–51; 7 Pick. 447; *Churchman v. Tunstal*, Hardres, 163; *Stark v. McGowen*, 1 N. & M'Cord, 387, 397, n.

(a) Ferries are said to be *publici juris*, and not to appertain to the riparian owners. Nor is this principle varied by those statutory provisions, hereafter to be noticed, which confer upon such owners a prior privilege in the establishment of ferries opposite their own lands. *Mills v. County, &c.*, 3 Scam. 53. A ferry right is an incorporeal hereditament, which grows out of the soil, and may be granted, like an *advowson*. It is also assignable. The grantee is entitled to use the soil only for ferry purposes. *Ib.* See *Pim v. Curell*, 6 Mees. & W. 234.

(b) As to fixing the *termini* of a ferry in a license therefor, see 15 Pick. 254.

so as to demand or receive pay, unless upon license from the Court of Quarter Sessions for the county where such ferry is, except such ferries as were then already stated as settled. This act was revised in 1797 in Massachusetts, and in 1821 in Maine, with the same inhibition and exception. All ferries, therefore, in these States, depend upon the general law, except such as were stated and settled as early as 1695, either by the court or the towns to whom they appertained.(1)

4. It is remarked by the court in Massachusetts, that the right to a ferry does not depend on a right to, or property in, the waters over which it passes. The two things may be wholly distinct. A ferry is a franchise, consisting in the right to transport persons and carriages for hire; and whatever may be the theoretic view of the law as to the property of public waters, it is very clear that they are held for the use of the public for all useful purposes. A ferry confers certain privileges, and imposes certain duties; not affecting the right of navigation, but presupposing its existence. They further remark, that a statute relating to the licensing of ferries, which is general in its terms, applies to navigable waters, because the public convenience so requires. A ferry does not, like a bridge, obstruct navigation.(2)

5. Ancient authorities thus state the law in regard to the privilege of a ferry. If I have an ancient ferry in a ville, and another sets up another ferry upon the same river, near to my ferry, so that the profits of my ferry are impaired, I shall have an action of the case against him; for you are bound to sustain the ferry and serve and repair it for the use of the people, under penalty of grievous amercement.(3)(a) Blackstone says, if a ferry is erected on a river, so near to another ancient ferry as to draw away its custom, it is a nuisance to the owner of the old one.(4) Judge Putnam holds it to be clear upon the authorities, that the franchise of a ferry is not confined to the ferry-ways, but is so far an exclusive right as to prevent near and injurious competition.(5)(b)

6. In England, when a ferry is erected by license from the crown, another cannot be erected without a writ *ad quod damnum*; and if a second grant be made without this clause, to the damage of the king or of the subject, it shall be avoided.(6) It is said, that, in this country, where the writ *ad quod damnum* is unknown, constitutional provisions and the common law afford an equivalent protection to individual property.(7)(c)

(1) Day v. Stetson, 8 Greenl. 367-8.

(2) Fay, &c., 15 Pick. 253.

(3) 22 Hen. VI, 14, pl. 23; 16 Vin. 30; Nuisance, H. pl. 25; 2 Rolle's Abr. 140; Nuisance, pl. 4.

(4) 3 Bl. Com. 218.

(5) Charles River, &c., 7 Pick. 485.

(6) Blissett v. Hart, Willes, 512; 16 Vez. 26; Nuisance, G. pl. 2.

(7) Per Putnam, J., 7 Pick. 482; Compton v. Susquehanna, &c., 3 Bland, 389.

(a) The owner of land, with the franchise of a ferry annexed, leased it. Held, that he was not responsible for damage sustained from the mismanagement of the ferry, by the lessee. Biggs v. Ferrell, 12 Ired. 1.

(b) Chancellor Kent expresses it, "all contiguous and injurious competition." Ogden v. Gibbons, 4 John. Cha. 161. See ch. 64, sec. 23. If there be tenants in common of a ferry, one of such tenants cannot establish a rival ferry. Norwood v. Norwood, 2 Bland, 476.

One licensed to keep a ferry cannot seize boats run at or near it, unless he has established the ferry, put it in operation, and done every act required by law. Lombard v. Cheever, 3 Gilm. 469.

(c) The assessment of damages may legally be made *after*, as well as *before*, the taking of the property, unless there be unreasonable delay or fraud, or such a change in the thing

7. In consequence of the public liabilities imposed upon the keeper of a ferry, it becomes *property*, an *incorporeal hereditament*, and is protected by the law.(1)

8. The grant of a ferry confers on the grantees an exclusive right, but the extent of the right must depend upon the terms of the grant. The grant of an exclusive right to take toll at a ferry, is not a monopoly.(2)

9. The ownership of a ferry gives no right to build a bridge.(3)

10. In Massachusetts, Parker, Ch. J., was of opinion, that a new ferry, set up by license from the State, is not necessarily a nuisance, because it lessens the tolls of the ancient one. It must, in a positive sense, be *near*, or within the range of the exclusive right of the old one. The contrary doctrine, though sometimes held, he thinks could never have been received in this country. Ferries were first established to accommodate the inhabitants, who were generally settled on the shores of bays or creeks, or on the banks of rivers. They were connected with roads leading to some market town, and settlers in the interior were obliged often to go by circuitous routes in order to cross a river or other water obstruction by a ferry. As the population increased in the country, new and more direct routes would be explored to the seaports, and they would come to the river several miles above or below the ferry. Public convenience would require a new ferry or bridge, which, however, must materially diminish the profits of the old ferry. But Judge Parker was of opinion that no compensation could be required.(4)

11. The nature and extent of the privilege involved in a ferry, in common with other similar franchises, is thus stated by Chancellor Kent. The grant of a franchise is a contract between the government and the grantee, which creates mutual rights and obligations between them. In this country, the most usual form of a franchise is in the chartering of bridge, ferry, turnpike and railroad corporations, with the right of taking tolls. By accepting a charter, the corporation assents to its terms and conditions, and becomes bound to furnish, at all times, the requisite facilities for passage and transportation. Hence it is liable to an action, by any individual who applies for such accommodation, and is, without reason, refused. On the other hand, the government incurs the obligation of giving to such grantee an exclusive privilege with reference to the purposes of the charter, and not to make any subsequent grant which will either directly or indirectly interfere with the prior one. In case of a road, the limits, within which the grant is to confer an exclusive right, are sometimes defined: but without such designation, an extent of privilege is implied, which will prevent the destroying or materially impairing of the franchise by another grant. Hence the establishment of a new and rival road is a nuisance, to be prevented by injunction, or recompensed by an action

(1) 2 Dane, 683.

(2) 7 Pick. 448.

(3) *Pain v. Patrick*, 3 Mod. 294; 7 Pick.

453. See *Piscataqua, &c. v. N. H., &c.*, 7 N. H. 60; *Infra*, sec. 33.

(4) 7 Pick, 515, 516, 519.

for damages.(1) In a late case, it is held, that ferry franchises are partly of a public and partly of a private nature. So far as they are *publici juris*, the legislature may legislate touching them, as to punish neglect or misconduct in conducting them, and secure passengers from danger, imposition, &c., but cannot take away the ferry itself, nor the legitimate rents and profits. Yet the franchise may be forfeited by non-user, or mis-user, judicially ascertained, or the government may, in the exercise of its right of eminent domain, resume it, upon making full compensation.(2)(a)

12. The plaintiff proved an exclusive, prescriptive right to the transportation of persons across the Humber, between Hull and Barton. The question was, whether a transportation from one of those towns obliquely across the river to another town, two miles lower down, was a violation of the plaintiff's exclusive right. Held, a transportation across the river, from one of those towns to any point above or below the other, unless done to avoid the plaintiff's ferry and in fraud of his right, was no violation of his franchise.(3)

13. The plaintiff claimed to be seized in fee of a ferry between Haverhill and Bradford, the value of which was destroyed by the erection of a bridge by the defendant. In 1652, the town of Haverhill voted, that A and his heirs should keep the ferry on certain terms, and for a limited ferriage. The plaintiff traced his title to one B, by deeds, for eighty years. B was proved to have been in possession of the ferry. Referees, to whom the case was submitted, made an award for the plaintiff, which was accepted by the court.(4)

14. From the preceding case, Mr. Dane infers, that some ferries in Massachusetts are private property, owned in fee, and not *appendant* to land. But in Maine, it is said, none such exist. A ferry is not of this description, which is traced back only to the year 1762; since and before which period ferries have been established only by license from the sessions. It does not appear, that the right to keep a ferry and demand toll, either in England or Maine, has ever been incident or *appendant* to any estate in land. The court may, if they please, license adjoining land owners, or the heirs of the original proprietors. But this does not change the tenure.(5)

15. By the court in Maine, the privilege arising from a ferry has been viewed as follows:

16. In England, the king has jurisdiction over tide and other navigable waters, to which private interests are subordinate. To this jurisdiction the state governments have succeeded. It is exercised in

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| (1) 3 Kent, 457, 459; <i>Beekman v. Saratoga, &c.</i> , 3 Paige, 45; <i>Yard v. Ford</i> , 2 Saun. 172; <i>Tripp v. Frank</i> , 4 T. R. 666; <i>Keeble v. Hickeringall</i> , Holt, 20; <i>Newburgh, &c. v. Miller</i> , 5 John. Cha. 111; <i>Ogden v. Gibbons</i> , 4, 160; <i>Dartmouth, &c. v. Woodward</i> , 4 Wheat. 518. See ch. 64. | (2) <i>Benson v. The Mayor, &c.</i> , 10 Barb. 223.
(3) <i>Tripp v. Frank</i> , 4 T. R. 666. But see <i>Huzzey v. Field</i> , 2 Crompt. Mees. & R. 432.
(4) <i>Chadwick v. Proprietors, &c.</i> , 2 Dane, 686 *
(5) 8 Greenl. 368-9. |
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* It is stated, in support of the high authority of this case, that the declaration was drawn by Parsons; that Mr. Dane was chairman of the referees; and that all the judges, Dana, Ch. J., Paine, Bradbury, Cushing and Dawes, were present when the award was accepted. Per Putnam, J., 7 Pick. 483-4.

(a) Grant to one, his heirs and assigns, of the right to establish a ferry on the Mississippi river, near a certain town, and run it "from lands at the said place that may belong to him." Held, the latter clause was limited to lands owned by him at the time of the grant. *Mills v. County, &c.*, 2 Gilm. 197.

authorizing the erection of bridges, and is subject to no restriction except what arises from prior grants. These, being once vested in corporations or individuals, cannot be resumed by the legislature, except in pursuance of a power reserved at the time of the grant. A grant is an executed *contract*, within the terms of the Federal Constitution. But a *license* to an individual to receive a compensation for certain services, (for no definite period,) is supposed to be of itself a fair equivalent for the services, and vests no right beyond the control of the government. The prohibition imposed upon all other persons does not attach to him; and, that he may not abuse his immunity, he is restrained from taking more than a certain compensation. The right to the ferry, the franchise in perpetuity or for an indefinite period, like a grant of this nature from the crown, which is a species of private property oftentimes of great value, the public do not part with. The license is in the nature of an *appointment to office*, with a right to fees, but held at the pleasure of the appointer. Upon the same principle, the sessions may license any number of ferries, according to the public convenience, &c. So, the legislature may grant a bridge, and, as is generally the case in Massachusetts and Maine, omit to provide compensation for the ferry which is injured. Such compensation might be requisite, where a ferry is private property owned in fee. And there may be cases, where compensation to a licensed ferryman would be equitable; and, if the facts were seen and understood, would probably always be enjoined by the legislature. But it would be a condition imposed not *upon*, but *by* them; not arising from a limitation of their power, but depending upon the exercise of their discretion.(1)

17. In 1762, the sessions in Maine granted a license to A to keep a ferry at his landing in Woolwich. He owned and occupied a large farm above and below the ferry. In 1769, his son, owning the same farm, was also licensed. A few years afterwards, the farm was sold to B, whose tenants kept the ferry without license till 1788, when he sold the farm to C and D. The same year C was licensed. The plaintiffs derived title to the ferry-house, landing and adjacent grounds from C and D. Licenses were granted to them and their grantors in 1805-12-22-26. There were no other licenses, and no ferry was ever claimed but by the owners of the ferry-house. From 1788 the ferry was known as Day's ferry, (the name of the plaintiffs.) The legislature having authorized a horse-ferry across the same stream, (the tide waters of the Kennebec,) and an appropriation of lands and grounds, paying damages; held, the grant was valid, and the plaintiffs had no claim for damages.(2)

17 a. In other States, the strict common law rule, as to the *exclusive* privilege of a ferry, seems to have been still further modified and restricted.

17 b. Thus, in Connecticut, the legislature granted to a town the franchise in a ferry across a large navigable river, and from time to time regulated the tolls. The town being divided, the privilege was transferred to the new town by its charter, to hold during the pleasure of the legislature. A subsequent act established a bridge over the river, and discontinued the ferry. Held, the act was constitutional.(3)

17 c. So, in Illinois, a legislative grant of a ferry franchise, unless

(1) 8 Greenl. 369-70.

(2) Day v. Stetson, 8 Greenl. 365.

(3) East Hartford, &c. v. Hartford, &c., 17 Conn. 79; 10 How. 511.

restricted by some general law or some provision of the grant itself, is necessarily exclusive, so far as it extends. The legislature, in granting a ferry, may legally divest itself of the right of eminent domain, by restricting the future exercise of its powers in relation to such ferry, or in other words, make a contract which it cannot constitutionally impair. But it is always subject to an implied reservation, that, whenever the public good or exigency requires, it may be resumed for an adequate compensation.(1)

17 *d.* So, in Georgia, it is held, that the ancient doctrine of the common law, that the franchise of ferry, although not declared to be exclusive, is necessarily implied to be so by the grant, is inapplicable to both the local situation and political institutions of this country; having had its origin in the feudal system, and undergone great modifications, if it has not been entirely abandoned, even in England.(2)

17 *e.* So, in Illinois, a license to keep a ferry between certain points, extending three miles on the Mississippi river, is not exclusive to that extent, but authorizes the establishment of the ferry from any point within the three miles, and, when established, other ferries may be licensed within the same limits, so that they do not interfere with the ferry-ways of the ferry first established. The ferry-ways of the ferry, when located, extend only so far as may be necessary for a convenient landing; and, though the owner may have the right, as exigencies require, to change his ferry landing after he has once established it, yet he has no such exclusive right of ferriage within the prescribed limits, as would prevent the licensing of another ferry within these limits.(3)

17 *f.* But, in New York, it is held, that the "Fulton Ferry," is vested in the corporation of the city of New York, as property, by an indefeasible title.(4)

17 *g.* The city having established ferries under its charters, which were run by lessees holding on short leases; they are, in judgment of law, set up, established, kept, and maintained by the corporation, within the true intent and meaning of the charters.(5)

17 *h.* The Cornbury charter of 1708 gave to the mayor, aldermen, and commonalty of New York, the right to establish ferries between the city and Long Island, and to hold them, with the revenues and tolls, forever. And, the corporation having acted upon that and other grants, by establishing the South ferry and the Hamilton Avenue ferry, the city and its inhabitants have acquired vested rights and valuable interests in those ferries, which cannot be taken away by the legislature.(6)

17 *i.* The Act of May 14, 1845, to establish and regulate ferries between the city of New York and Long Island, does not, by its terms, embrace the three existing ferries, or interfere with vested rights, so as to require the court to determine the question of its constitutionality; but it expressly excepts those ferries, and leaves the rights of the city of New York therein, undisturbed.(7)(a)

(1) *Mills v. County, &c.*, 2 Gilm. 197; *East, &c. v. Hartford, &c.*, 17 Conn. 79.

(2) *Shorter v. Smith*, 9 Geo. 517.

(3) *Gales v. Anderson*, 13 Illin. 413.

(4) *Benson v. The Mayor, &c.*, 10 Barb. 223.

(5) *Ib.*

(6) *Ib.*

(7) *Ib.*

(a) By a late statute, (1853, 213.) three or more persons may constitute themselves a corporation to maintain a ferry, with power to take a grant of land for that purpose, but not to interfere with pre-existing rights.

18. Most of the English cases on this subject relate to ancient rights to ferries and markets, founded on prescription. When one can show that he has claimed and enjoyed an exclusive privilege from time immemorial, a grant in his favor will be presumed, co-extensive with the enjoyment. But actual grants are to be interpreted by their terms. And in some instances even prescriptive privileges are restrained in favor of the public interest and convenience.(1)

19. Where a statute authorizes the officers of a city to license a ferry claimed by the city, if required by the public convenience, &c. ; if they grant such ferry, with a covenant, express or implied, for exclusive use, still they may grant another, if the public convenience, &c., so require. The authority is vested in them *as trustees for the public*;(a) and cannot be restrained by the covenant of the city through them. They act in a double capacity. If the city is exclusive owner of the franchise, its grantee would hold against a license by the officers; if otherwise, notwithstanding a prior covenant for exclusive use, the officers may license a new ferry, as agents for the public.(2)

20. With regard to the question of public convenience, &c., as pertaining to the grant of a ferry; it is immaterial whether roads leading to the ferry be opened before or after the latter.(3)

21. There are early dicta, that a ferry requires ownership of the soil on both sides. It is said, that a ferry is in respect of the landing place, and not of the water; the water may be in one, the ferry in another, and in every ferry, the land on both sides of the water ought to be in the owner of the ferry; otherwise he cannot land on the other part. He who has the privilege of a ferry, ought to have the soil on both sides of the water; for he cannot land upon the soil of another, without his assent.(4) But this principle has been questioned in late cases, both in England and in this country.(5)

22. The general doctrine has already been stated, as to a *right of way from necessity*. This principle has been brought in question, in reference to the landing places of public ferries. The prevailing rule seems to be, that there is no right to use land not belonging to the owner of the ferry for this purpose, even though it be a public highway. This was the early doctrine in England, and has been adopted in Pennsylvania.(6) But late English authorities overrule it, and hold it sufficient, that a landing place is a highway, to justify the use of it in connection with the ferry.(7)(b)

(1) 7 Pick. §476. See *Troter v. Harris*, 2 Younge & J. 285.

(2) Fay, &c., 15 Pick. 252.

(3) Fay, &c., 15 Pick. 254.

(4) *Ipswich v. Brown*, 13 Vin. 208; *Ferry*; Com. Dig. *Piscary B*.

(5) Fay, &c., 15 Pick. 254; 6 B. & C. 703; *King v. Nicholson*, 12 E. 333; *Gourdine v. Davis*, 1 Bal. 469.

(6) 3 Kent. 420, n.; *Chambers v. Furry*, 1 Yeates, 167; *Cooper v. Smith*, 9 S. & R. 26.

(7) *Peter v. Kendal*, 6 Barn. & Cr. 703.

(a) The right to receive toll for crossing a river on the highway, is a franchise belonging to the whole people, as succeeding to the crown. *Young v. Harrison*, 6 Geo. 130.

So, in Illinois, the county commissioners' court, under the law authorizing that court to grant ferry license, was not authorized by any exclusive grants it might make, to divest itself of the power to grant other ferries, within any prescribed limits, whenever the public should so require. *Gales v. Anderson*, 13 Ill. 413.

(b) Otherwise, in North Carolina. *Pipkin v. Wynns*, 2 Dev. 403. It has also been held in the case of *Bowman v. Wathen*, 2 M'Lean, 376, that the right to a ferry attaches to the riparian proprietor, and cannot be taken from him without compensation. He may convey the soil, except the right of ferriage, which then becomes an incorporeal hereditament, being a right to use the soil for this purpose only. In Pennsylvania, the exclusive right of crossing

23. The owner of a private ferry has no right to land boats and passengers, at the terminus of the highway, between high and low water mark, on the opposite margin of the river, without consent of the owner of the land.(1)

24. In most of the United States, specific statutory provisions are made in regard to the establishment or licensing of ferries. It is foreign from the plan of this work, to notice anything more than a few prominent features of these acts.

25. In Kentucky, no person shall transport across the Ohio river, within one mile of an established ferry; and no ferry shall be established across this river, within a mile and a half of a former one, unless there is an impassable river between; or, on the Cumberland river, within a mile.(2) No person shall transport from the other side of the Ohio, to Jefferson County in Kentucky, within one and a half miles of an established ferry, without a grant from the Kentucky side.(3)

26. In the same State it is held, that the applicant for a ferry must own the lands on both sides.(4)

27. In Tennessee, no one shall transport across a river, within ten miles of an established ferry.(5) The owner of the landings, or of the land on each side, shall be licensed, and have power to land boats on the opposite banks. Where a ferry is necessary, and the banks belong to different persons, each shall be entitled to a license, and bound to allow the other to land on his soil.(5) Any one may use a public ferry landing for loading, &c., not interfering with the ferry.(6) Private ferries are subjected to the same rules as public.(7) In this State, it is held, that a ferry may be established, without regard to the ownership of the soil. The land owner, however, has a prior claim, and, if an owner above or below is appointed keeper of a ferry, he may have the appointment rescinded. A ferry may be licensed across a navigable river, though the opposite bank lies in another State. A new ferry may be licensed near an old one, though of less public benefit than the latter.(8)

28. In Ohio, the owner of the banks of a river has an exclusive right to be licensed for a ferry. If there are different owners on oppo-

(1) *Chess v. Manown*, 3 Watts, 219; (1 Yeates, 167.)

(2) 1 Ky. St. 593-4, St. 1837, 227. See *City &c. v. Taylor*, 11 B. Mon. 361.

(3) St. 1836, 594; 1837, 319; *Churchill v. Grundy*, 5 Dana, 100; *Carter v. Kalfus*, 6, 43; *Lexington v. M'Murtry*, 3 B. Monr. 516; *Dover v. Fox*, 9 B. Mon. 200.

(4) *Taylor v. Bostle*, 1 Rep. 594.

(5) 1 Scott, 107, 1023. See *Sparks v. White*, 7 Humph. 86.

(6) 2 Ib. 176.

(7) Ten. St. 1825, 47.

(8) *Allen v. Farnsworth*, 5 Yerg. 189; *Corporn. &c. v. Overton*, 3 Yerg. 387; *Blair v. Carmichael*, 2 Yerg. 306; *Nashville, &c. v. Shelby*, 10 Yerg. 280. See *Waller v. McHenry*, 3 Humph. 245.

a navigable river, can be derived only from a grant by the commonwealth. There can be no ferry by prescription or presumption. But long-continued use may give an exclusive right to embark and land passengers upon the shore, as far as low-water mark, though it be the land of another person. *Bird v. Smith*, 8 Watts, 434.

In Illinois, a ferry franchise is not an incident to the ownership of land. *Trustees, &c. v. Tatman*, 13 Illin. 27.

And a party cannot exercise a ferry franchise on his own land, without the consent of the State. *Ib.*

But, when an easement is granted to the public, upon the margin of a navigable stream, the right to use and treat it as a landing is undoubted. *Godfrey v. City, &c.*, 12 Illin. 29.

In Georgia, grants of lands on water-courses from the State, with appurtenances, convey no right of public ferry. The right of private ferry passes with the fee; and, for any interference with this, the owner is entitled to compensation. *Harrison v. Young*, 9 Geo. 359.

site sides, there is a mutual right. And unless such owners apply for a license, any other person may obtain one. Unless the landing is upon a highway, a ferry cannot be established without the consent of the land owner. But an exception is made of small streams in high water (1)

29. In Indiana, the owner of the land upon the side of a stream, where a ferry is to be established, has a prior claim for a license; but, if he omit to apply, another person may do it: in which case, however, the land owner may afterwards buy him out, by repaying his expenditures, with ten per cent. interest. No new ferry shall be granted within a mile of an old one, unless the public convenience, &c., so require. Ferry landings shall not be obstructed. The county commissioners may license ferries. The owner of land is entitled to a ferry, and may take ferry-boats, &c., already established on his land, paying therefor. (2) In this State, it is said, exclusive ferry privileges were unknown till created by statute. Hence, the statutory penalty is the only remedy for an invasion of them. A ferry right is assignable, and is treated as real estate, descending to heirs, being subject to dower, &c. (3) (a)

30. In Illinois, the owner of the land has a prior claim to a ferry, (as also a bridge.) But any person may cross the stream, or carry his neighbors without a fee, in his own boat, without intending to injure the owner of the ferry. The exclusive privilege of a ferry or bridge extends three miles. (4) (b)

31. In Missouri, it is provided that no *free* ferry shall be established within one mile of a licensed ferry. But, by a late statute, the County Court may license ferries at discretion, as many as it shall judge best in any river. In Arkansas, a ferry over a public navigable stream is a public ferry. The owner of one or both banks of a river, or one having a pre-emption or settlement title thereto, may establish a ferry, and all lakes meandered in making public surveys of the United States lands, and retained by government as public property, are included in the above provision. A license is required, and in some cases will be granted, for a ferry over a private stream. (5)

32. In Virginia, the owner of land on one or both sides of a stream, through which a highway passes, may obtain a license for a ferry. But one ferry shall not be established within half a mile of another. (6) The

(1) Ohio St. 447.

(2) Ind. Rev. L. 259-60-1-4; Rev. Sts. 295.

(3) Lang v. Scott, 1 Blac. 405; 2 McL. 376; 3 Kent, 421, n.

(4) Illin. Rev. L. 303-6-7-10. See Trustees, &c. v. Tatman, 13 Illin. 27. Vanhard

v. Chever, 3 Gilm. 469; Munsell v. Temple, 3 Gilm. 93.

(5) Misso. St. 276; Sts. 1847, 55; Ark. Rev. St. 402-5. See Harrison v. State, 9 Mis. 580.

(6) 2 Rev. C. 130-1; St. 1840, 58. See Ib. 47, 113.

(a) One owning upon a navigable river may convey the soil, reserving the ferry. If the ferry alone be granted, the soil can be used by the grantee for no other purpose. Bowman v. Wathen, 2 McL. 376.

(b) The sale of school lands, to a party who has a ferry franchise, will not be affected by a forfeiture of the franchise; the sale and franchise being independent. Trustees, &c. v. Tatman, 13 Ill. 27.

The State alone can insist upon or waive such forfeiture. Ib.

A ferry franchise is not secured to the inhabitants of a township, by the ordinance of 1818, which provides that section sixteen, in each township, shall be granted for the use of schools. Ib.

The order of the county court, directing the justices to be summoned, to consider the verdicts of juries in ferry cases, was held to be executed, by leaving the summons at the residences of the justices. Somerville v. Wimbish, 7 Gratt. 215.

owner, &c., of a ferry upon the shore of another State, the river being the State boundary, shall not carry from the Virginia shore within two miles of an established ferry. By the Code, the county court may establish a ferry, subject to future regulations. Private ferries are forbidden.(1)(a)

33. In North Carolina, the proprietor of a ferry may erect a toll-bridge in the same place.(b) In the same State, a new ferry shall not be granted, unless the public convenience strongly require it. A person may be licensed, though owning land on neither side.(2)

34. In Alabama, where one owns land on both sides of a river, and a ferry is necessary, he shall have it on both sides upon his land, unless the public convenience, &c., will be thereby prejudiced; but, if the location is the best on one side, and not on the other, the court may order otherwise. No ferry is allowed within two miles by water, of one already established, except upon a river within two miles of some town. In Mississippi, the owner of the soil has a prior claim.(3)(c)

35. In Georgia, there shall be no ferry on a stream over which a bridge is erected at the expense of the county.(4)(d)

36. In Massachusetts, an ancient colonial ordinance provided, that whosoever hath a ferry granted upon any passage, shall have the sole liberty for transporting passengers from the place where such ferry is granted, to any other ferry-place, where ferry-boats are to land; and any ferry-boat that shall land passengers at any other ferry, may not take passengers from thence, if the ferry-boat of that place be ready.(5) In Vermont, ferries are licensed by the selectmen. In Connecticut and Massachusetts, the duty of supporting ferries is imposed on towns, un-

(1) St. 1835-6, 66; Code, 334. See St. 1840-1, 91.

(2) 1 N. C. Rev. St. 544; *Beard v. Long*, 2 Law Rep. 69; *Raynor v. Dowdy*, 1 Mur. 279. (See also 3 Ib. 57; 1 Hayw. 457; 2 Dev. 403.)

(3) Aik. Dig. 363-4; Miss. Rev. C. 360-1. See *Jones v. Johnson*, 2 Alab. (N. S.) 746.

(4) Prince, 735.

(5) Col. Laws (1672), 50, *Ferries*.

(a) A owned land lying on a river in Virginia, over which there was a ferry from his land, established in 1762, and a public road ran through his land to the ferry. From the opposite side there appeared to have been a ferry from 1770 to 1826, when it was allowed to run down. In 1848, a special act was passed, authorizing the county to establish or revive the ferry from the opposite side, after certain proceedings. Held that, in Virginia, ferries were creations of the statute, and the rights of the owners of ferry franchises were limited by the statutes; that it was competent for the legislature to establish the ferry from the opposite side, and in the same time with A's ferry, though it had existed for so long a time; that it was no invasion of his franchise to do so; and that the grant of the ferry conferred on the owner no title to any portion of the soil on the opposite side, and no easement beyond the privilege of using the highway to land passengers on. *Somerville v. Wimbish*, 7 Gratt. 205.

(b) See sec. 9. In the same State it is held, that though the government may establish ferries at their pleasure, without regard to ownership of the soil, yet the adjacent land owner is entitled to a preference, and, on his refusing to exercise the franchise, it may be granted to another, he paying for the land. *Pipkin v. Wynns*, 2 Dev. 403.

(c) A license for a ferry does not authorize the obstruction of the stream by a rope, used for pulling the boat across. *Babcock v. Herbert*, 3 Alab. (N. S.) 392. See *Ricks v. Hall*, 4 Port. 178; *Botts v. Bridges*, 274. In a suit against the owner of a ferry across a river, for the loss of a wagon in crossing a creek which emptied into the river; the plaintiff may show that the defendant had, at other times, conveyed persons and property across the creek, to enable them to cross the river higher up, for the purpose of proving that it was an appendage to the ferry across the river. *Garner v. Green*, 8 Ala. 96.

(d) Seven years' regular, exclusive and uninterrupted usage of a public ferry, in Georgia, is *prima facie* evidence of a prescriptive right. *Harrison v. Young*, 9 Geo. 359; or creates the presumption of a grant. *Williams v. Turner*, 7 Geo. 348.

less some individual or corporation is bound.(a) In Connecticut, the owner of a ferry has an exclusive right; but any person may cross the river in his own or neighbor's boat for private business. The County Court has authority to establish a new ferry where an old one had been discontinued, and to grant new ferries. In Maine, where a horse or steam ferry is established by the legislature, the county commissioners shall not allow another within one mile.(1)

CHAPTER LXIV.

FRANCHISES. BRIDGES, ETC. CONSTITUTIONAL LAW.

1. In this country, the most important point of view in which the subject of *franchises* can be considered, is their relation to the constitutions the United of States, and of the respective States. Several cases have arisen, involving the question, how far the grant of a franchise is a *contract*, and the franchise itself *private property*, the former of which, by fundamental constitutional provisions, cannot be impaired,(b) nor the latter appropriated, without compensation, to public uses; and, as depending upon this question, the further practical one, whether a subsequent grant of a similar or rival franchise, interfering with the former one, is, upon the grounds mentioned, unconstitutional and void. Some recent and elaborate decisions upon this subject have related to *toll-bridges*, chartered by the State legislatures. They have also incidentally involved the subject of *ways* and *ferries*, which rest on substantially the same ground with bridges, and which have been treated of in the chapters immediately preceding. The natural association of topics, therefore, leads us now to take a view of American constitutional law upon the subject of *franchises* or *chartered rights*, more particularly those cases which relate to ways, ferries and bridges.

2. A very important case of this class has recently arisen in Massachusetts.(2)

(1) Conn. St. 225-6; Sts. 1847, 30; Mass. &c., 17 Conn. 79; Enfield, &c. v. Hartford, Rev. St. 250; Me. St. 1842, 10. See Me. &c., 17 Conn. 454.
 Rev. St. 214-7; Verm. Ib. 143; Felton v. (2) Charles River Bridge v. Warren Bridge, Deall, 22 Verm. 170; Wethersfield v. Humphrey, 20 Conn. 218; East, &c. v. Hartford, 7 Pick. 344. See Att'y Gen. v. Birmingham, &c., 2 Y. & C. 124.

(a) There are similar provisions in Vermont and Maine. 1 Verm. L. 497; 2 Smith, 886.

(b) The effect of such grant *at common law* is involved in the same inquiry.

The same general principle has been applied to *national grants*. Thus a grant of land, or of a franchise, from a government which still continues in possession, but which has, by treaty, ceded all its rights in the territory in which the land lies, to another nation, is void. The United States v. Reynolds, 9 How. U. S. 127. Davis v. Concordia, Ib. 280. Goodtitle v. Kibbe, Ib. 471. The United States v. D'Auterive, 10 How. U. S. 609.

Thus, a grant of a perpetual ferry franchise, made by the Spanish Governor of Louisiana, after the treaty of St. Ildefonso in 1800, is void. Davis v. Concordia, 9 How. U. S. 280.

So of a grant of land, although lying in that part of the territory of Louisiana which Spain asserted was not ceded to France by that treaty, which France never actually occupied, and which the United States, though constantly asserting their title under that treaty and the treaty of Paris of 1803, did not take possession of until 1810. The United States v. Reynolds, 9 How. U. S. 127.

3. By an ancient ordinance, dated 1636, 1640, and 1642, the government of the colony of Massachusetts, having previously established a ferry, between Boston and Charlestown, over Charles river, recite that they have given the *revenue* of the ferry to Harvard College. In 1640, the ferry was given to the college, being then leased. In May, 1650, the college was incorporated. In October, 1650, the college having petitioned in regard to rectifying the *ferry rent, which belongs to the college*, it was ordered, that the president, for the college, might lease, or otherwise dispose of the ferry. In 1654, an act, imposing a tax for the benefit of the college, spoke of the *profit* of the ferry, formerly granted. From 1639, to 1785, the college received the profits; since 1650, sometimes managing the ferry themselves, and sometimes leasing it. The college fixed the tolls, but the legislature passed various acts, regulating the ferry, and sometimes affecting the tolls. The college was in some instances consulted, in others, not. In 1784, a statute incorporated certain persons, for the purpose of building a bridge in the place where the ferry between B and C is now kept; and authorized them to receive toll for forty years, and double toll on Sunday; (they paying the college £200 per annum, which they accordingly paid,) and the bridge, at the end of the time, to revert to the State, saving to the college a fair annual compensation for the loss of the ferry. In 1792, an act established the West Boston Bridge Corporation, to build a bridge across the same river, from Boston to Cambridge, the legislature having previously resolved, that the act of 1784 was not the grant of an exclusive right to build over these waters. The act of 1792 authorized a toll for forty years, required the payment of an annuity to the college, and in consideration of the risk and importance of the work of building the Charles River Bridge, and the loss which the plaintiffs would suffer from the new bridge, extended their charter for thirty years, with the exception, that the additional toll on Sunday should be relinquished.

In 1828, the defendants were incorporated to build another bridge across the river, between Boston and Charlestown, distant from the former, in Charlestown, 260 feet, and in Boston, 915 feet. The plaintiffs thereby lost two-thirds of their former tolls. The plaintiffs brought a bill in equity, for an injunction to restrain the building of the new bridge.

4. Held, by Morton, J., that the grants relating to the ferry, as practically construed, gave to the college a permanent, indefeasible interest therein, subject to the regulation of the government; by Putnam, J., that the college had a fee in the ferry; and by Parker, Chief Justice, that, prior to 1650, the State was a trustee of the ferry for the college, the grants having given to the latter, not the ferry itself, but only a permanent right to the profits; but the act of 1650 relinquished the trust, and vested the ferry in the college, subject to public regulation; by Parker, Ch. J., Wilde and Morton, Js., that the Charles River Bridge did not acquire the ferry by the act of 1784, but, (by Wilde, J.,) that it was extinguished by this act, and the acquiescence of the college, and by Morton, J., that the ferry was seized by the government, for the public necessities, a fair compensation being provided; but, by Putnam, J., that the college, for a consideration, relinquished the ferry to the bridge, during its charter.

By Putnam, J., that if a ferry had been established, either by the

State, or an individual, where the Warren Bridge was built, it would have been a nuisance to the former one; and by Parker, Ch. J., that the grant of the ferry between Boston and Charlestown, did not give an exclusive right to the toll of all passengers between these places, nor was it limited merely to the ferry-ways themselves, but it gave a right to receive the tolls of all, who, in crossing the river between Boston and Charlestown, would, in the usual course of travel, pass over this ferry; that, whenever the increase of travel should so require, the State might establish a new ferry, and, if near the old one, a compensation must be made to the latter; but, in order to render a compensation necessary, the two must be positively *near*, and within the same range, a point to be determined by the terms of the grant—if the latter should merely diminish the custom of the former, this condition would be dispensed with.

By Parker, Ch. J., and Wilde, J.; that the grant of a bridge, or ferry, near an old one, is not a *taking of private property*, within the meaning of the Constitution of the United States, which requires a compensation to the owner, in case of such taking, the damages not being immediate, but consequential; by Putnam, J., the contrary, under the State constitution, and by Parker, Ch. J., that the fundamental theory of our government forbids the making of a new grant, to the necessary prejudice of a prior one, without providing compensation.

By Morton, J., that neither was the charter to the defendants an *appropriation of private property*, nor did it *impair the obligation of a contract*, because the plaintiffs' right, under their charter, did not exceed the limits of the bridge itself, but merely empowered them to receive a toll from all who passed over it; and, by Wilde, J., that the acts of 1784 and 1791, especially the latter, gave the plaintiffs no exclusive right of transportation between Boston and Charlestown.

By Putnam, J., that, the plaintiffs having acquired a right to the ferry, whatever would have been a nuisance to the ferry, was such, also, to their bridge; (a) and, that the act, authorizing them to erect a toll-bridge, involved an implied engagement against any future grant which would divert their tolls, and, hence, the charter to the defendants was void, as impairing the obligation of a contract; and, by Parker, Ch. J., that it was void, for the same reason, and upon the principles of the State constitution, because the plaintiffs' charter gave them the same rights as to tolls between Boston and Charlestown, which attached to the ferry, and impliedly engaged that these rights should not be disturbed or impaired, except in case of public necessity, and then, that a compensation should be provided.

5. As this case involves many important principles, it seems proper to give a somewhat more extended notice of the grounds upon which the several judges rested their respective opinions.

6. Morton, J., was of opinion, that the ferry right of the college never vested in the plaintiffs. Being an incorporeal hereditament, it could pass only by the deed of the college. (b) The legislature could

(a) Where a bridge was substituted for a ferry, and a penalty was provided against all passing in any other way; held, Chancery would issue an injunction against a railroad company's transporting passengers across in a steamboat. *Cony v. The Yarmouth, &c.*, 3 Hare, 593.

(b) See *Peter v. Kendal*, 6 B. & C. 703.

not interfere with it, having no power to take private property, even for a compensation, except for public uses; nor did they undertake to interfere with it. The charter to the plaintiffs did not purport to convey the franchise of the ferry, nor depend in any way upon the assent of the college. Hence, upon the expiration of the bridge charter, the plaintiffs would have no remaining right to the ferry.(1)(a) In regard to the exclusiveness of the plaintiffs' right under their charter, it could not be co-extensive with the river, because the Cambridge bridge then existed, nor with the towns of B and C, no such provision being found in the charter; and it must, therefore, be either a right to take toll of all passengers across the river below Cambridge bridge, or of all passengers over the bridge; any other construction being wholly loose and indeterminate. The case is analogous to those of banks and turnpikes, both of which, by their charters, are charged with onerous duties to the public. It is well settled, though once thought otherwise, that a bank charter confers no exclusive right; and it has never been questioned that the legislature may charter a new turnpike, though the effect will be to diminish the profits of an old one. It would be impossible to draw the line between a diversion of travel amounting to a destruction of the former franchise, and the very smallest diversion. Hence, the grant must be limited to the right of taking toll from all passengers over the road, and the practice of the legislature has corresponded to this principle. The commonwealth does not contract, that no new charter shall be granted which shall interfere with the business or profits of the old; or for an exclusive right to the *same line of travel* which at first passes over the bridge; for this would be a covenant against any change in the channels of communication, the course of business and the state of society, and the effect would be, an entire prohibition of all further internal improvement. No improved road, no new bridge, canal or railroad, could be constitutionally established; because none could be opened without diminishing the profits of some old corporation.(2) The words of the plaintiffs' charter are, "that a toll be and hereby is granted for the sole benefit of the proprietors," to be collected of passengers. Nothing further is granted or covenanted for expressly; and it is the rule of English law, *a fortiori* applicable in a republic, that the grant of government passes nothing by implication, or at least that it shall be more strictly construed than a private grant, and include only what is essential to the enjoyment of the thing granted.(b) The plaintiffs must

(1) 7 Pick. 451, 452.

| (2) 7 Pick. 454, 460.

(a) Wilde, J., was of the same opinion. The annuity to be paid to the college was, in pursuance of the plaintiff's charter, the price paid for it, and to be reimbursed by the tolls. Hence, it was eventually paid by the public. The effect was the same as if it had been made payable into the State treasury, and the State had compensated the college; and, therefore, even if the ferry were purchased and not extinguished, the government were the purchasers. 7 Pick. 466, 467.

(b) Wilde, J., concurred, especially as to grants relating to objects connected with the public interest or convenience, and conferring exclusive privileges. Some grants, upon valuable and adequate considerations, as, for instance, of land, may constitute an exception. 7 Pick. 468, 469. It is held in other States, that grants and franchises are to be construed in favor of the State. *Miners', &c. v. United States*, 1 Iowa, (Greene,) 553. That, if the terms of the contract between the individual, or the corporation, and the State, are ambiguous, the ambiguity must operate in favor of the public. *McLeod v. Burroughs*, 9 Geo. 213. And that a grantee takes nothing by implication, but is confined to the terms of his charter. *Harrison v. Young*, 9 Geo. 359; *Shorter v. Smith*, 9 Geo. 517.

be presumed to have accepted their charter, with a knowledge that the legislature would have power to do many future acts which would impair its value.(1)

7. Wilde, J., was of opinion, that the preamble of the plaintiffs' charter, reciting the petition for, and the benefits of a bridge, and the enacting clause, incorporating the plaintiffs, and granting a toll to reimburse the expense of building a bridge, did together authorize the erection of such bridge, but contained no further grant or covenant by implication. The second charter to the plaintiffs, made after the rejection of their exclusive claim upon the chartering of the West Boston bridge, was a donation for the encouragement of enterprise, and its terms clearly negatived any implied covenant for an exclusive right. The *public accommodation* was the declared object of the grant; implying, that, if this object should afterwards demand new avenues, they should be provided. And the decision of the legislature upon this point is conclusive.(2) If the tolls taken by the defendants were a part of the plaintiffs' *freehold*, then a compensation was provided for in the defendants' charter. But, in fact, the plaintiffs had no *property* in the tolls, but only in the franchise; for if any one were prevented from passing their bridge, the action would be case, and not trespass for taking their property. Tolls and profits in expectancy are not *property*, within the meaning of the constitution, for the taking of which compensation must be provided; but the injury caused by the diversion of travel is merely consequential, like that sustained by the keeper of a public house, for example. Upon any other principle, the diversion of a single traveller would be an unconstitutional act.(3)

8. Putnam, J., was of opinion, that the college, for a valuable consideration, consented to the plaintiffs' having the ferry, during the continuance of their charter, and the charter recognized such assent. The college ceased to use the ferry, received the annuity, and the plaintiffs built their bridge over the ferry and took the tolls. Hence, it is plain that the college could maintain no suit against the plaintiffs for a violation of their right.(4) The surrender of the ferry must be presumed to have been made to the plaintiffs, for a consideration, rather than to the State, without consideration. If the bridge were accidentally destroyed, the plaintiffs would have the ferry during their charter; and, after its expiration, the ferry would revert to the college without a new grant. The charter to the plaintiffs does not expressly authorize them to build a bridge. Hence, the grant must be to some extent construed by implication, otherwise the plaintiffs would have been indictable for a nuisance; and the true principle is, to make all such implications as are necessary to effect the manifest intent.(a) The maxim applies, "*id certum est, quod certum reddi potest.*" A public grant, for *consideration valuable*, is to be construed more favorably for the grantee than the government.(5) The franchise in a toll-bridge is no more to be confined to the width of the bridge, than a ferry is to be confined to its

(1) 7 Pick. 461, 464.

(2) Ib. 470, 471, 474, 475.

(3) 7 Pick. 471, 473.

(4) Ib. 480-91.

(5) Ib. 486-90.

(a) Acc. Parker, Ch. J. Thus, a grant of a right to cut timber on public lands would involve the right of passing over others, if necessary to effect the object. 7 Pick. 521.

ways. The franchise of both alike consists in the profits derived from transportation. Both are *publici juris*, and derivable from the grants of the State. If the franchise is confined to the width of the bridge, then the legislature might authorize a *free bridge* directly alongside of the old one. The maxims of the common law are applicable:—"one shall not do indirectly what he has no right to do directly;" and "every grant shall carry with it all things which are necessary to the enjoyment of it." (a) There is little danger of any direct infringement or repeal of a bridge charter; but unless there is some constitutional safeguard, very great danger of an indirect violation, by the establishment of another bridge at the side of the old one, which shall draw away all its profits. (1) There is an obvious distinction between the charter of a bridge, corporation and that of a banking or insurance company. The latter merely gives individuals authority to do, as a corporation, what they might have done as individuals. Though paying a *bonus*, these corporations are under no obligations to accommodate the public; and they may at any time dissolve themselves. But bridges and ferries are *publici juris*, and the proprietors may be compelled to allow the public the use of them. (2) If the legislature has the ultimate power of judging as to the expediency of chartering new bridges, &c., then the old ones are in effect held at the will of the grantor, though purporting to be for a term certain. (3) In regard to the case of the West Boston bridge, the decision of the legislature was merely, that the plaintiffs' charter did not give them an exclusive right over the *Charles river*. But the grant of the new charter, in answer to an application made under a *claim of right*, was an admission that the plaintiffs' rights were infringed. (4) As to the question, *how near* a new bridge might be built, the plaintiffs are not bound to answer it *on compulsion*. It is sufficient for them that, in this case, the two bridges are side by side. The question is one for a jury to settle, and the damages must be in proportion to the amount of injury sustained. The maxim *de minimis*, &c., might apply. (5) The plaintiffs' franchise does not fall under *the real estate*, for the taking of which compensation is provided by the defendants' charter. (6) If legislative contracts may be violated, it must put a stop to the investment of capital in public enterprises. The effect of the new bridge is the same as if the legislature had sequestered \$60,000 from the plaintiffs' tolls to build it. After it has been paid for from the tolls, it reverts to the commonwealth, who then either make it free, and thereby wholly destroy the plaintiffs' franchise, or receive the tolls to their own use, in violation of their contract with the plaintiffs. (7) (b)

9. Parker, Ch. J., was of opinion, that as to the inherent qualities of a grant, and the construction of it in relation to the thing clearly granted and its necessary attributes, the rule is the same with public as with private grants. Thus, the grant of a franchise implies the undisturbed use of it, so far as respects the acts of the government or

(1) 7 Pick. 492-5.

(2) 7 Pick. 495-6.

(3) Ib. 496.

(4) Ib. 498.

(5) Ib. 501-2.

(6) Ib. 502.

(7) Ib. 503-5.

(a) See *Lucas v. Lottery, &c.*, 11 Gill & J. 490.

(b) Acc. Parker, Ch. J., 7 Pick. 530-1. The establishment of a *free bridge* would be a virtual assumption of the plaintiffs' franchise. 531.

those claiming under it, unless the public convenience, &c., should require otherwise; and then it implies a covenant to provide indemnity. But this indemnity is to be predicated upon actual and not prospective value.(1) The plaintiffs' charter is merely the grant of a license to build a bridge in the place prescribed, with the right to take toll from passengers. But this toll being the consideration for the erection of the bridge, the legislature could not do any act by which the plaintiffs should be deprived of it, without an indemnity. The grant, however, being only for a bridge between Boston and Charlestown, would not preclude another one between Boston and any other place.(2) The great profits heretofore derived from the plaintiffs' bridge can have no bearing upon this question. The enterprise, at its commencement, was an uncertain one, and the question of loss and gain was merged in the compact; and moreover present holders of shares have probably taken them at a rate much above the original value, relying upon the continuance of the charter.(3)

10. The judges of the Supreme Court of Massachusetts being equally divided in the foregoing case, the bill in equity was dismissed. The case was carried by the plaintiffs below to the Supreme Court of the United States, by which the judgment of the court below was affirmed, three justices dissenting. The grounds of the several opinions were substantially as follows.

11. Taney, Ch. J., was of opinion, that the defendants' charter was not unconstitutional, even though retrospective, and affecting vested rights, unless it impaired the obligation of a contract, (2 Pet. 413, 8, 110.)(4) With regard to the college ferry, it ceased to exist, as soon as the bridge was erected, as much as if a convulsion of nature had made there a passage of dry land, "The bridge was built in the same place, and its abutments occupied the landings of the ferry." Hence, even if the plaintiffs were assignees of the ferry, they themselves extinguished it, and with it all the ferry rights incident thereto. But the ferry was not assigned to the plaintiffs. The whole proceedings show, that an assignment by the college was not by any one deemed material to the plaintiffs' charter, but that the ferry was taken by the government for public uses, a compensation being provided, and the college consenting to receive it, both during the plaintiffs' charter, and after its expiration. Nor were the plaintiffs *assignees in equity* of the college. The annuity was to come out of the tolls, that is, out of the public, and was an incumbrance taken into account in granting the charter. Nor is the plaintiffs' charter to be construed by the extent of the ferry right. The ferry and the bridge were different franchises, chartered at different periods, by different acts, and without words of reference from one to the other. As to the construction of the plaintiffs' charter, it is a grant by the public to a private corporation, and must be strictly construed. Thus, in the case of *Prop'rs, &c. v. Wheely*, 2 Barn. & Ald. 793, such a grant is termed a bargain between a company of adventurers and the public, and the former can claim nothing that is not clearly given them. In this case, the charter authorized the company to exact toll for articles which passed "through any one or more of the locks." It also expressly authorized all persons to use the canal, so that the company had

(1) 7 Pick. 521-3.

(2) *Ib.* 526-8.

(3) 7 Pick. 532.

(4) 11 Pet. 539-40.

no power to prevent it. Yet the court decided, that for using only one of the levels, without passing through the locks, no toll could be recovered. Hence, it appears that the English courts are restraining the spirit of monopoly, by confining corporations to the privileges plainly given them; and there is no good reason, why in this, as in other respects, we should not follow the English law. Indeed, the same principle has been adopted in several instances, by this court; (8 Pet. 738, 3, 289, 4, 168.) The case of *Providence Bank v. Billings*, (4 Pet. 514,) is very nearly analogous in principle to the present case. There, the plaintiffs were incorporated in the usual form; and a tax was afterwards imposed upon all the banks in the State. It was held that, although their charter was a contract, the plaintiffs were bound by this tax, because the State should not be *presumed* to have relinquished so essential and fundamental a power as that of taxation. The plaintiffs contended, in that case as in this, that the taxing power might be so exercised as to destroy their franchise. The same principle applies to all powers of government, in which the interest of the public is involved. Of these none is more important in the growing state of our country, than the opening of new avenues for travel and trade.(1) The plaintiffs' charter expressly grants nothing, but the ordinary faculties of a corporation for the purpose of building the bridge, and the right to take certain tolls. It gives no exclusive privilege over the river; no power to build themselves, or prevent others from building another bridge; no engagement that another shall not be built, or to abstain from everything which might diminish the tolls. Hence no provision of that charter is violated by the erection of the Warren Bridge, which neither interrupts the passage over the plaintiffs' bridge, nor renders the way to or from it less convenient, but merely destroys its income by diverting passengers.(2) The plaintiffs' charter of 1792, under which alone they can now claim, and which was made while the former one was in full force, expressly refers to the charter of the West Boston Bridge, and is made to recompense them for the injury thereby sustained. The acceptance of this charter precludes the plaintiffs from setting up an exclusive right.(3) The fact, that amidst the great number of similar cases which have occurred in this country, no such exclusive claim has before been set up, indicates the general understanding that it could not be maintained. If the plaintiffs should prevail, similar applications would immediately be made on behalf of the numerous turnpikes which have been superseded by railroads and canals. And as the extent of the exclusive right is left wholly uncertain, the court would be compelled to fix by some arbitrary rule the width of this new kind of property in a *line of travel*.(4)

12. McLean, J. was of opinion, that although the plaintiffs' bridge was *substituted* for the ferry, yet they had no assignment of the latter. Upon the destruction of the bridge, the ferry would probably have reverted in the college; it certainly would not belong to the plaintiffs. The college, for the annuity, either suspended its ferry rights during the charter, or else abandoned them to the public. The charter does not grant the ferry privileges; but refers to it, merely to fix the site

(1) 11 Pet. 544-8.

(2) Ib. 548-9.

(3) Ib. 550-1.

(4) Ib. 551-3.

of the bridge.(1) In regard to the construction of the charter, the broad rule, that in governmental grants nothing can be implied, is not sustained by authority. Both by a royal grant, and by a legislative act, everything passes that is essential to the enjoyment of the thing granted. A grant made at the suit of the grantee is construed strictly; but a grant by special favor of the king, or on a consideration, is construed more liberally. In the case of the *Sturbridge Canal v. Wheeley*, Lord Tenterden said the right must be *clearly given*; but afterwards, that it must be *clearly given by inference*, in the absence of any express grant.(2) If the boundaries of the plaintiffs' right can be fixed, it is as exclusive and as incapable of being resumed or regranted as any other public grant whatever. The franchise, though incorporeal, in legal contemplation has body and extension, and is as scrupulously guarded by law as an interest in the soil. The value of a bridge is not estimated by its quantity of timber and stone, but by the travel over it. A destruction of the bridge would have been a less injury to the plaintiffs than the establishment of a new bridge; because in the former case it might be rebuilt, but the injury caused in the latter must be a permanent one. Although in extending the plaintiffs' franchise beyond the timbers of the bridge, it is difficult to designate its precise extent; yet there is the same difficulty in every question of public or private nuisance. Because the franchise cannot be measured by feet and inches, it does not follow that the complainants have no rights. In determining upon facts which establish rights or wrongs, an exercise of judgment is indispensable, the facts of each case are considered, and a sound and legal conclusion is drawn from them. The previous erection of other bridges, which remotely affected the plaintiffs, and for one of which, the West Boston Bridge, an indemnity was provided, does not justify the present more direct injury. The plaintiffs' franchise must extend a *reasonable distance*; not so great as to subject the public to serious inconvenience, nor so limited as to authorize a ruinous competition.(3) If the legislature may resume the plaintiffs' franchise indirectly, through the instrumentality of the defendants, they might also do it directly.(4) The tolls are *property*, the value of which may be estimated by past receipts. The entire value of the bridge consists in the right of exacting toll. The injury is of the same nature as if the legislature had authorized an impassable wall, encircling the ends of the bridge, as distant from its abutments as the Warren Bridge.(5) Whatever may be the rule in other States, it is well settled in Massachusetts, that chartered rights are entitled to protection. The case in 4 Pet. 560, merely decides that a tax may be imposed upon property held directly under a grant from the State, as well as other property. So the plaintiffs' bridge might be taxed.(6) The charter is not a *monopoly*, being granted for a consideration. A monopoly is the withdrawing a common right, and vesting it exclusively in individuals.(7) The government may take for public uses, a bridge as well as other private property, in whole or in part; but on condition of providing compensation.(8) In the extension of the national road through the State of

(1) 11 Pet. 556-7.

(2) 11 Pet. 557-8.

(3) Ib. 560-4.

(4) Ib. 564.

(5) Ib. 565-6.

(6) Ib. 566-7.

(7) Ib. 567.

(8) 11 Pet. 569.

Ohio, a free bridge was thrown across a stream, by the side of a toll-bridge; but, after reconsidering an application which was at first rejected, the proper authority estimated the value of the charter, and made compensation.(1) As to the objection, that the legislature could not grant any part of the eminent domain, so as to bind a subsequent legislature, this principle would prevent a binding grant to the plaintiffs even within the timbers of their bridge. Acts of incorporation are *contracts*. The charter to the plaintiffs did not preclude future and similar charters, but the thing granted passed to the grantee, and was no more subject to be resumed than a tract of land; except in the case, alike applicable to both grants, of its being wanted for public use. The only compensation provided for the plaintiffs by their charter, is the provision for payment of the annuity by the defendants. The legislature has thus undertaken to do what a jury only could constitutionally do.(2) McLean, J., was further of opinion, that the charter to the defendants, though operating to take private property without compensation, did not impair the obligation of a contract, because it did not act directly upon the contract, and therefore was not repugnant to the constitution of the United States, but only to the constitution of Massachusetts; and upon this ground, that the court had no jurisdiction of the case.(3)

13. Story, J., was of opinion, that the plaintiffs' charter must, to some extent, be construed by implication, because it does not in the enacting clause empower them to build a bridge, or state where it is to commence or terminate, except by inference from the preamble.(4) The charter is a *contract* and *grant*, and to be construed as such, and not as a *mere law*. The rule of construing the king's grant strictly, is applicable only where it admits of two interpretations, either of which may be adopted without violating the apparent objects. If one will make the grant void and worthless, and the other will give it a reasonable effect, the latter shall prevail. And in every case the rule shall bend to the real justice and integrity of the case. It is also dispensed with, where the grant flows from the *special grace, certain knowledge*, and *mere motion* of the crown; or where it is made for a valuable consideration, and therefore constitutes a contract. And there is no distinction between grants of *lands*, and grants of *franchises*. Moreover, the plaintiffs' charter is not a royal grant, but a *legislative* grant, by a public statute; and is therefore to receive a rational and fair construction, according to the general rules of expounding public statutes. We are to ascertain the legislative intent, and to give it a full and liberal operation. It is always to be presumed that the legislature intend the most beneficial construction of their acts, when the design of them is not apparent.(5) Parliamentary grants for private enterprise are contracts, and to be reasonably construed, according to the intent; which may be either expressed or inferred from the terms. In case of ambiguity, the contract shall be taken most strongly against the grantor, and most favorably for the public.(a) There is no analogy between royal

(1) 11 Pet. 568.

(2) Ib. 568-71.

(3) Ib. 571-83.

(4) Ib. 587.

(5) 4 Mass. 534-7.

(a) Where a grant is of a *private* nature, in case of ambiguity, the construction will be in favor of the State. If of a *public* nature, it will be in favor of the grantee. And in both

grants, and those of a republican legislature. (a) Our legislatures neither have, nor affect to have, any royal prerogatives; and our constitutions make no provision for construing their grants differently from those of individuals. In the case of a legislative grant, there is no ground to impute surprise, imposition or mistake, to the same extent as in a mere private grant of the crown. The former is made upon deliberation, and after debate. This charter is not a statute involving political powers and sovereignty, but it is a solemn contract. It is no more a restriction upon the legislative power, than a grant of land. In both cases the only restriction is, that the legislature cannot twice grant the same thing. The *legislative power* remains; the *subject matter* only has passed from the hands of the government. The charter is not a grant in derogation of the rights and interests of the people; for no individual had a previous right to build a bridge over navigable waters. And if by *the people* is meant *the State*, the same principle would apply to a grant of public land. If the obstruction of navigation is referred to, inasmuch as equivalent public rights of greater accommodation were obtained, the charter was a mere exchange of one public right for another. That a public grant is against *the public interest* is not to be assumed. It is a question to be judged of by the legislature; and in this case they expressly declare that the proposed bridge *will be of great public utility*. The court has no authority to gainsay this declaration. The plaintiffs' charter is not a *monopoly*, within the meaning of the 6th article of the Massachusetts Bill of Rights. This article is not an inhibition of all legislative grants of exclusive privileges; but a promulgation of the reasons against hereditary officers. It admits the right to grant exclusive privileges *for public services*. A monopoly is an exclusive right granted to a few, of something which was before of common right; a definition manifestly inapplicable to this case. Even a monopoly, of such a nature as to promote *the public good*, is liberally construed; as, for instance, a patent for inventions. This charter should be liberally construed, because the work is declared to be of great public utility, and because the grant is a contract, for adequate consideration, and the work was undertaken at the time with very great chances of failure and loss, which must have been borne exclusively by the grantees. (1) The charter is the grant of a franchise to erect a bridge over Charles River between Charlestown and Boston, and to take tolls or *pontage* from passengers. It is limited to those towns. As to the extent of the exclusive right, it reaches a *reasonable distance* on the river; so that *the ordinary travel* to the bridge shall not be diverted. As in all cases of alleged nuisance, the question is not as to *the distance*, but as to *the injury*. When the plaintiffs accepted their charter, they took upon themselves all risks, and, even though the bridge should prove wholly unproductive, they became absolutely bound by all the engagements on their part up to the end of the charter. They could not even surrender it without the consent of the legislature; and at the end of forty

(1) 11 Pet. 602-11.

cases, upon the same ground, the *public good*. *Lucas v. Lottery, &c.*, 11 Gill & J. 490; *Middleton v. Pritchard*, 3 Scam. 520. See *Hagan v. Campbell*, 8 Por. 9; *Gledstanes v. Sandwich*, 4 Mann. & G. 995.

(a) See *Mardin v. Waddell*, 16 Pet. 367.

years must deliver the bridge in good repair to the State. It is obvious, under these circumstances, that if the legislature had expressly reserved the right of granting other charters, which would injure or wholly destroy this one, it would not have been accepted. Yet, by the defendants' charter, the legislature has annihilated by its own acts all chances of the plaintiffs' receiving tolls, by withdrawing the whole travel, though it is admitted it cannot take away the barren right to gather tolls, if any should occur, when there is no travel to bring a dollar. Upon this principle, the legislature might block up every avenue leading to the bridge, and at the same time punctiliously exact the discharge of every burden imposed by the charter. It is admitted that the legislature cannot revoke or resume the plaintiffs' grant. Yet there is no negative covenant in the charter; it is mere matter of implication. And does not the same implication which prohibits them from taking away or resuming the franchise itself, also preclude them from taking away its whole substance and value? When a thing is granted, the law gives impliedly, whatever is necessary for the taking and enjoying it. In this case, the tolls are thus necessary to the enjoyment of the plaintiffs' corporate rights. A charter from the government implies a contract not to re-assert the right to grant the franchise to another, or to impair it. The rights legally vested in any corporation cannot be controlled or destroyed by a subsequent statute, unless the former act reserve a power for that purpose.(1) In England, the king cannot make a grant which shall prejudice the profits of a prior one. Hence, in the grant of a fair, market or ferry, a clause is usually inserted, that it shall not be to the prejudice of any other existing franchise of the same nature. But if there is no such clause, this proviso is implied; and for a breach of it, the grant may be revoked. There can be no distinction in principle between a ferry and a bridge. Both are necessarily granted between certain *termini*, and impose certain burdens. The ancient principle of the English law, which forbids the establishment of a rival and injurious ferry, has been fully recognized by modern decisions, both in England and in this country. Nor is there any distinction in principle between a ferry established under a grant, and one established without a grant, to the injury of a subsisting ferry; nor between the exclusive right of a ferry *by prescription*, and the right of one existing *by grant*. If the plaintiffs would have a right of action against any one who should forcibly prevent a passenger from going over their bridge, this shows that they have a right to the tolls *before they are actually earned*; and there is no good reason why the diversion of passengers in any other way, as by another bridge, should not also give a right of action.(2)(a)

(1) 4 Wheat. 658; 2 Mass. 143-6.

| (2) 11 Pet. 617-30.

(a) The above outline of Judge Story's learned, elaborate and eloquent opinion, is exceedingly meagre and imperfect; but on account of its great length, is all for which I have room. I would only add, that this opinion has never been surpassed, in talent and learning, by any effort, even of its distinguished author.

Another case, involving many of the same principles, and some new ones, has been recently decided in Massachusetts. The plaintiffs were incorporated, with power to build a dam westerly from Boston to Brookline, over an arm of the sea, and thence to run a cross-dam southerly, to the shore, making on one side of the cross-dam a full basin, and on the other an empty or receiving one; to cut raceways from one to the other; to have the use of the land in the basins, derived partly from the State and partly from individuals, either

13 *a*. The charter of the Richmond, Fredericksburg and Potomac Railroad Company, provided as follows: "Whereas, the railroad authorized by this act, will form a part of the main, northern and southern route, between the city of Richmond and the city of Washington, and the privilege of transporting passengers on the same, and receiving the passage money, will, it is believed, be a strong inducement to individuals to subscribe for stock in the company, and the general assembly considers it just and reasonable, that those who embark in the enterprise, should not be hereafter deprived of that which forms a chief inducement to the undertaking: Be it therefore enacted and declared, and the general assembly pledges itself to the said company, that in the event of the completion of the said railroad, from the city of Richmond to the city of Fredricksburgh, within the time limited by this act, the general assembly will not, for the period of thirty years from the completion of the said railroad, allow any other railroad to be constructed between the city of Richmond and the city of Washington, or for any portion of the said distance, the probable effect of which would be to diminish the number of passengers traveling between the one city and the other, upon the railroad authorized by this act, or to compel the company, in order to retain such passengers, to reduce its passage money," was not infringed. Held, the charter, by the subsequent act, authorized the Louisa Railroad Company to cross the track of the other road at some distance from Richmond, and to continue their road to Richmond, unless the first company would allow them to transport passengers and freight over their road at certain rates. [McLean, Wayne, and Curtis, Js., dissenting.](1)

14. In a recent case in New Hampshire, between two bridge corporations, similar questions were raised. The court remarks: "if F had had the grant of a ferry generally, we should pause before holding that the legislature could not grant a bridge, or even another ferry, so near as to be consequentially injurious to him. Upon this subject different opinions have been entertained; and it may well be questioned whether the grantee of a ferry, or of a right to erect and maintain a bridge at a particular place, without any terms of exclusion in the grant, can set up that right in avoidance of any other grant which is not directly injurious in its operation, but injurious merely in its remote consequences, by diverting travel and tolls."(2)

(1) *Richmond, &c. v. Louisa, &c.*, 13 How. U. S. 71.

(2) *Piscataqua, &c. v. N. H. Bridge*, 7 N. H. 59; (*Callender v. Marsh*, 1 Pick. 432.)

by purchase or appropriation for public use, at an appraisement, and to use, sell or lease the power thus created. The dams were built accordingly, and also mills; and afterwards the defendants were incorporated, with power to construct a railroad across the basins, compensating the plaintiffs for any injury thereby occasioned to them. Held, the latter charter was not unconstitutional: that the plaintiff's franchise was not annulled thereby, but merely a portion of the land, over which it was to be used, appropriated to another and distinct public use, consistently with the provisions of the plaintiff's charter, which gave only an interest and qualified property in the land, subject to such future appropriation. *Boston Water, &c. v. Boston & Worcester, &c.*, 23 Pick. 360; acc. *Bellona*, 3 Bland. 448. So, where the land of an individual is taken, under authority of the legislature, for a public use, and a full compensation paid to the proprietor for a perpetual easement therein; and is afterwards appropriated, by legislative authority, to another public use of a like kind; the owner is not entitled to any further compensation. *Chase v. Sutton, &c.*, 4 Cush. 152. In New Hampshire, the Revised Statutes provide (pp. 119-20,) that a corporate franchise, &c., may legally be taken for a highway. See *Bell v. The Hull, &c.*, 2 Nich., &c. 279; *Manser v. Northern, &c.*, 1b. 380; 4 Ad. & El. (N. S.) 46.

15. The court proceed to remark, that the understanding would seem to be in that State, that, unless the grant of a franchise contains special provisions against competition, it is left to the wisdom and discretion of the legislature to afford proper protection, by withholding any new grant in the immediate vicinity of the old one, except in case of imperious necessity. The grantee is presumed to assent to a new grant which only remotely affects his interests, provided the terms of his own charter are not violated. Hence, though one has an exclusive ferry within certain limits, the legislature may charter a bridge near it, provided the place actually occupied by the ferry is not taken, and an exclusive ferry is left him as before; even though its profits are impaired. So, with regard to a bridge; the grant of it is necessarily exclusive, so far as the bridge itself extends; so that a subsequent legislature cannot treat the grant as void, and authorize another bridge on the same foundations, or in the same place. The charter of a bridge may go beyond this, and, as a matter of necessity, may authorize the grantees to lay broader foundations, or erect works above or below for the preservation of the structure. On the same principle, the legislature may make other grants, sufficient to secure the erection of the bridge by the prospect of remuneration, and provide for its preservation and repair by means of tolls. They alone are to judge how far the grants shall extend. The court further remark, that changes in population and intercourse may require the opening of new avenues within the limits of an exclusive grant. In such case, the individual right is subservient to the public use; "but whatever the public require, they are able to pay for." Upon these grounds it was held, that a subsequent charter to the defendants was not unconstitutional or void, but good as against the public; that the prior franchise of the plaintiffs was their property, and could not be taken without compensation; but that the right to take it *for a compensation* did not impair the obligation of a contract, no covenant being implied in the former grant. It may be questioned whether a legislature *can* part with its right to take property for public uses. But the act must itself provide compensation. It is not sufficient that the plaintiffs have a *right of action* for the damage which they sustain. "The legislature cannot empower any *one to do a wrong*; and a right to take by wrong, (thereby giving a right of action,) would be a solecism. So far as the defendants may act lawfully under their charter, they are not subject to an action. So far as they cannot, they ought to refrain. Their charter does not purport to authorize them to interfere with the *plaintiff's property*." (1) Upon the ground last named, the defendants' charter was held void. *

16. In 1819, a case arose in the State of New York, (2) which, though turning upon the construction of a deed, and not of a legislative grant, involved similar considerations to those dwelt upon, at so great length, in the case of the Charles River Bridge. The deed conveyed the exclusive right of the grantor to navigate with steamboats from the city of New York to *Elizabethtown Point*. The defendant, to a bill for injunction brought by the grantee, answered, that he navigated between New York and *Halsted's Point*, which was within the township of Elizabethtown, but separated from Elizabethtown Point by a large and

(1) *Piscataqua, &c. v. N. H. Bridge*, 7 N. H. 59; (*Callender v. Marsh*, 1 Pick. 432.)

(2) *Ogden v. Gibbons*, 4 John. Cha. 150.

navigable creek; and that his wharf is near Elizabethtown Point. In giving judgment for the plaintiff, Kent, Chancellor, remarked,⁽¹⁾ that the grant of an exclusive right to run steamboats between New York and Elizabethtown Point, was intended to comprehend the entire benefit of all the travelling and passengers going to and from Elizabethtown and New York. It meant to embrace the whole stream of intercourse between these two places, and Elizabethtown Point was used for the landing-place of the town. No other landing-place occurred to the parties, or it doubtless would have been inserted. The intention of the instrument is clear, from the general description, and the nature of the grant as an exclusive privilege, and the particular locality of the land and waters. Any other construction is unreasonable, and incompatible with the objects of the grant, and the principles of the common law. The exclusive right described includes the use of the waters on the usual passage between those *termini*. Any narrower construction would render the deed *a fraud* upon the grantee. It would be like granting an exclusive right of ferriage between two given points, and then setting up a rival ferry within a few rods of those very points, and within the same course and line of travel. The common law contained principles, dictated by a sounder judgment and a more enlightened morality. The grant must be so construed as to give it due effect, by excluding all contiguous and injurious competition.

17. Application for injunction by the Mohawk Bridge Company against the Utica, &c., Railroad Company, to restrain the erection of a bridge over the Mohawk river. The plaintiffs owned a toll bridge across the river, about one hundred rods above the defendants' proposed bridge; and their bill alleged, that the latter would be a damage to them, by diverting travel from their bridge, and interfere with the exclusive privilege secured by their charter. The plaintiffs' charter prohibited any ferry within a certain distance from the bridge. The Chancellor, in giving his opinion against the application, remarked as follows: As the erection of the defendants' bridge was authorized by their charter, the natural remedy of the complainants will be a suit at law, after any injury has occurred. The only relief to which the complainants can be entitled, on account of the diversion of travel, would be an injunction to restrain the defendants from carrying passengers across the river on their bridge. But this could not deprive the defendants of the right to have a bridge to cross upon with their locomotives and cars, which would not interfere with the rights of the complainants. There cannot be a reasonable doubt, however, as to the defendants' right of carrying passengers across the river in their cars, so long as they confine themselves to those who travel upon the railroad, and do not carry those who merely wish to cross the river in that way to avoid the plaintiffs' toll. The plaintiffs' charter, though prohibiting a *ferry*, does not deprive a future legislature of the right to authorize another bridge, if the public good so require; much less to provide for a conveyance from one part of the State to another, by an improvement which was unknown when the charter was granted. Even if the plaintiffs' charter had given them the *exclusive* right of erecting a toll-bridge across the river at Schenectady, the grant to the defendants, to cross

(1) *Ib.* 160-1.

the river with their railway from Schenectady to Utica,^(a) would be no infringement of it, as the railroad bridge would not be a *toll-bridge*, within the meaning of the former act; which, being in derogation of public rights, must be construed strictly, and with reference to the intent and particular objects of the grant.⁽¹⁾

18. The plaintiffs erected a toll-bridge over the river Wallkill, in connection with a turnpike, under an act of the legislature; and the defendants afterwards erected another road and bridge near to the former, and thereby diverted the toll from the plaintiffs' bridge. The suit was a bill in Chancery, for a perpetual injunction, as for a nuisance. Kent, Chancellor, in giving judgment for the plaintiffs, said, "Considering the proximity of the new bridge, and the facility that every traveller has by means of it and the road connected with it to shun the plaintiff's gate, which he would otherwise be obliged to pass, I cannot doubt for a moment, that the new bridge is a direct and immediate disturbance of the plaintiff's privileges. The new road by its *termini* created a competition most injurious to the statute franchise; and becomes, in respect to such franchise, a nuisance. The consideration, by which individuals are invited to expend money upon great, expensive and hazardous public works, as roads and bridges, and to become bound to keep them in repair, is the grant of an exclusive toll. This right, thus purchased for a valuable consideration, cannot be taken away by direct or indirect means, both of which are equally unlawful."⁽²⁾

19. In 1784, the legislature of Connecticut licensed A and B to establish a line of stages from Hartford to Byram river, during the pleasure of the legislature, and prohibited all other persons in the meantime from setting up any stage-wagon on the road, without license, under a penalty. Held, this was a grant to A and B of an incorporeal hereditament, in the nature of a franchise, but that it did not extend to, and was incapable of assignment by, their heirs, because the words *heirs and assigns* were not used; that the words of exclusion must be restricted to the duration of the grantees' interest; and that the use of the road by an assignee of A's administrator for nearly twenty years, without interruption or the interference of any other line, being a use which was lawful for him in common with others, raised no presumption of an exclusive title.⁽³⁾

20. In another case in the same State, (the particular facts of which it is unnecessary to enumerate,) the legislature incorporated certain persons, and authorized them to construct locks in connection with a toll-bridge to be erected by them. Dagget, J., remarked as follows: This case is not like grants of *turnpikes, ferrys, banks, &c.* A grant to construct locks exhaust the power of the legislature of locking those falls. A grant to another company, to lock the same falls, would be a palpable infringement of the first grant. It would strip the first grantees of essential rights, the power of reimbursing themselves for neces-

(1) *Mohawk Bridge v. Utica, &c.*, 6 Paige, 554. See *Great North, &c. v. Clarence, &c.*, 1 Coll. 507; where one company had erected walls to prevent the other's crossing its road, and the court issued a mandatory injunction for their removal.

(2) *Newburgh Turnpike v. Miller*, 5 John. Cha. 101.

(3) *Nichols v. Gates*, 1 Conn. 318.

(a) The act authorized the construction of a railroad or way, and, when necessary, to construct the *railroad or ways* across any stream of water. P. 561.

sary and heavy expenditures. Such an act would be void, as opposed to common right, and to the constitution of the United States. Nor can the grant be resumed upon compensation. A franchise, in the possession and execution of which the public interest may be as well subserved by one company as another, cannot, like land, be taken for public purposes. Could the State divest the several banks of their chartered rights to make room for a State Bank? It was further held, however, that, as the right was granted to the plaintiffs thirty years before, as the erection of the locks was merely incident to the bridge, and *in itself* rather a burden than a privilege, and as the power had lain dormant fifteen years, the plaintiffs were not in *the exercise and enjoyment* of any right, and the Court of Chancery would not interfere, by injunction, to prevent the execution of a grant for this great public object to another corporation.(1)

20 a. Similar questions have more recently arisen in the same State, between a bridge and a railroad corporation. It is held, that the franchise of the *Enfield Toll Bridge Company*, (aside from any special legislation regarding it,) is subject to the same legislative control, for public use, as any other species of property.(2)

20 b. A corporation, created by the legislature, was authorized to erect a bridge across Connecticut River, from Enfield to Suffield, and to collect certain tolls; and the charter provided, that "no person or persons shall have liberty to erect another bridge, anywhere between the north line of Enfield and the south line of Windsor." Held, this was not a covenant distinct from the franchise, but identical with it, and subject to the same laws.(3)

20 c. The charter of a railroad company provided, that the company should be holden to pay all damages that might arise to any person or persons, and that freeholders should assess just damages to those whose real estate might be taken, or injured. Held, a franchise, issuing out of land, was an incorporeal hereditament, which might be treated as real estate within the charter, and an injury done to it be the subject of assessment.(4)

20 d. The charter of the Hartford and Springfield Railroad Company provides, that nothing therein contained shall be construed to prejudice or impair any of the rights now vested in the Enfield Bridge Company. Held, this did not protect that company from the legislative power of eminent domain, with respect to its franchise, but only declares, that, notwithstanding the privilege of constructing a railroad from Hartford to Springfield, in the most direct and feasible route, granted by such charter, the franchise of the Enfield Bridge Company should remain as inviolate as the property of other citizens of the State; *i. e.*, if taken, or injured, compensation should be made. [Two judges dissenting.](5)

20 e. So, it is held in Georgia, that the legislature, or the inferior court, as its agent, after having chartered a company to make a particular improvement, for public accommodation, without any provision that no rival improvement should afterwards be authorized, may grant a charter to another company, or individual, to make an improvement

(1) *Enfield Toll, &c. v. Connecticut, &c.*, 7 Conn. 52-4.

(2) *Enfield Toll Bridge Co. v. Hartford & New Haven Railroad Co.*, 17 Conn. 454.

(3) *Ib.*

(4) *Ib.*

(5) *Ib.*

of the same, or of a different kind, to afford the like accommodation, however the work of the junior company may impair, or even destroy, the profits of the elder.(1) The doctrine is, that the legislature may grant charters, with exclusive privileges; but, should a change in the business, population and intercourse of the country require it, new avenues may be opened within the limits of such exclusive grant, by providing just compensation. That there is no difference between a franchise and any other property in this respect; all may be made subservient to the public use, provided the public faith be not violated in making adequate remuneration.(2)

20 *f.* So it is held in Vermont, that there is no implied contract by the State, in a charter of a turnpike, or other private corporation, that their property, or even their franchise, shall be exempt from the common liability of the property of individuals, to be taken for the public use, on making proper compensation. And a railroad is an improved highway, and property taken for its use, by authority of the legislature, is property taken for the public use, as much as if taken for any other highway. So the legislature may delegate its power to a railroad corporation, to take private property for public use, in the construction of their railroad, as well as to a turnpike corporation, for a like use.(3)

20 *g.* So, where there has been a legislative grant to a private corporation, to erect a bridge, turnpike, or other public convenience, which is not in its terms exclusive; there is no constitutional obligation on the legislature, not to grant to a second corporation, the right to erect another one, for a similar purpose, so near the former, as greatly to impair, or even to destroy, its value, and this without making compensation.(4)

20 *h.* But, so far as the real estate of such private corporation, or their interest in real estate, is concerned, they are entitled to the same constitutional protection, as to compensation, that an individual would be.(5)

21. A very important case recently arose in Maryland, which, in addition to some points of a political character, involves, in a peculiar form, the question of chartered rights.(6)

22. The defendants were incorporated by the legislature of Maryland, in 1827, for the purpose of constructing a railroad from Baltimore to the Ohio river. In 1824, the plaintiffs were incorporated in Virginia, upon condition of the assent of Maryland, Pennsylvania, Congress and the Potomac Company, of which the plaintiffs were to become assignees, and whose object was the improvement and extension of the navigation of the Potomac, by canals, locks, &c. The assent of the parties mentioned being obtained, the Potomac Company transferred its rights to the plaintiffs. The plaintiffs' charter designated the valley of the Potomac as the route of the proposed canal. Between the *Point of Rocks* and Cumberland, in this valley, on the Maryland shore, there were between 40 and 50 miles of narrow, difficult passes, requiring for the canal embankments in the bed of the river, and thus rendering it impracticable, unless the plaintiffs should have a prior choice of location to the defendants. Held, the plaintiffs had such priority of choice. The charter of the Potomac Company was a

(1) *Shorter v. Smith*, 9 Geo. 517.

(2) *Ib.*

(3) *White River, &c. v. Vermont Central, &c.*, 21 Verm. 590.

(4) *Ib.*

(5) *Ib.*

(6) *Chesapeake, &c., Canal v. Baltimore, &c., Railroad*, 4 Gill & J. 1. Two judges dissented. See 11 *Ib.* 490.

contract between the States of Maryland and Virginia and the company, not to be impaired without the consent of the latter. The Potomac Company had a right, which the subsequent charter of the defendants could not impair, to select, or appropriate, by purchase or condemnation, any lands in the valley, for canals along the river, and the plaintiffs succeeded to this right. An abridgment of the right of choice in selecting the route impairs the obligation of the contract. It is not like the case of an elder and junior warrant to land, where the first location gives a prior right; but the act of incorporation is a grant, and the right conferred a vested franchise, independent of any act of location or survey. The corporate right to select and acquire land for the authorized purposes of a corporation, is *property*. It is an incorporeal hereditament; not a legal title to the land itself, nor a mere capacity to acquire and hold land, common to every individual; but, in addition thereto, it is a right or privilege, a portion of the eminent domain, vested in the corporation, to acquire the legal title to land, subjected by the grant to its will. This franchise of one corporation cannot afterwards be given to another; nor can any other legally acquire a right of way, or title to land, embraced in the franchise, which will interfere with the powers of the former grantee.

23. It has been held in Alabama, that a ferry over a public water-course, held by the license of an authorized tribunal, is subject to the public convenience. Hence, a toll-bridge, erected near it by a corporation chartered for that purpose, is no infringement of the previous right; nor does the principle against taking private property without compensation, apply to such a case.(1)

24. In South Carolina, the State may take the charter of any toll corporation, after thirty-four years from the first receipt of tolls, upon paying the par value of the stock, where the State did not take stock therein, or the charter was granted to individuals in fee. The State may grant other charters, when the public convenience, &c., requires. When the public good requires a bridge at a chartered ferry, the State may make it, on paying the ferry corporation 100 per cent. advance, upon the cost of roads and landings connected therewith.(2)

25. In Illinois, counties may purchase toll-bridges, or turnpikes, on paying the cost, and ten per cent. interest.(3)(a)

(1) *Dyer v. Tuscaloosa*, 2 Port. 296.

(2) S. C., Sts. 1827, 19, 20, 27.

(3) Illin. Rev. L. 308.

(a) In Pennsylvania, the legislature may constitutionally incorporate a company to make a lock and slack-water navigation, without requiring compensation for consequential damage to individuals. *The Monongahela, &c. v. Coons*, Law Rep. May, 1844, p. 38. As to the rule adopted in Mississippi, see *Commercial, &c. v. Chambers*, 8 S. & M. 9.

CHAPTER LXV.

FRANCHISES.—FAIRS AND MARKETS.

1. IN the English law, the title of *Franchises* embraces a variety of subjects—such as *Forest, Chase, Free Warren, &c.*—which are wholly unknown to American jurisprudence. The right of *Fishery* is also classed under the same head; but this will be more appropriately considered in connection with the general subject of *Water-courses*. Another franchise, in England, is the right of holding a *fair or market*,^(a) which is derived from the king's prerogative. But, to prevent the nuisance arising from the excessive multiplication of fairs, when the king grants a patent, it is usual to have a writ *ad quod damnum* executed and returned. And, if the patent be found *ad damnum* of the neighboring markets, it is void.⁽¹⁾

2. If a person levies a fair or market in a vill next to one in which a fair or market has been long held, to be on the same day, by which the latter is injured, it is a nuisance. So, if erected without patent, to be held on different days, it may be a nuisance.⁽²⁾

3. But the lapse of twenty-three years has been held to bar an action in favor of the proprietor of the old fair, having a patent, against the proprietor of the new one.⁽³⁾

4. A toll, though usually annexed to a fair or market, is not a necessary incident, but derivable only from the king's grant, or by prescription; and, if the toll be unreasonable, the grant is void. A fair without toll is called free.⁽⁴⁾

5. An ancient statute (Westminster 1, c. 1,) provides, that the taking of outrageous toll shall be punished by a forfeiture of the franchise.⁽⁵⁾

6. If a fair is granted, generally, the grantee may hold it where he pleases. And if granted within a certain town, after locating it in one place he may remove it to another; provided the change be not an inconvenience to the public. The right of removal is incident to the grant. This principle is said to be a salutary one, because the changes which take place in the buildings of a town, require a corresponding change in the market. After the old place is abandoned, the owner may treat those, who enter upon it without leave, as trespassers.^{(6)(b)}

7. If one has a grant to hold a fair on Monday, and he holds it on

(1) *Rex v. Butler*, 3 Lev. 222; 2 Vent. 344; Bac. Abr. *Prerogative*, F. 1; 7 Pick. 482; *Mosley v. Walker*, 7 B. & C. 40; *Prince v. Lewis*, 5, 363. See *Macclesfield v. Chapman*, 12 Mees. & W. 18; *Rex v. Starkey*, 7 Ad. & Ell. 95; *Thompson v. Gibson*, 7 Mees. & W. 456.

(2) 1 Rolle's Abr. 140; Fitz. N. B. 184, n.; *Yard v. Ford*, 2 Saun. 172.

(3) *Holcroft v. Heel*, 1 B. & P. 400; 2 Saun. 175 a, n.

(4) 2 Inst. 19; *Heddy v. Wheelhouse*, Cro. Eliz. 558.

(5) 2 Inst. 219.

(6) *Curwen v. Salkeld*, 3 Cruise, 181.

(a) The only value of the principles of the common law upon this subject, to the American lawyer, consists in their analogy to the rules which govern the franchises of *Ferries and Bridges*. In this point of view, they were often referred to in the important case of the *Charles River Bridge*. (Ch. 64.)

(b) A custom, to enter upon the commons and waste of a manor, at fairs, and erect booths thereon—is valid. *Tyson v. Smith*, 9 Ad. & Ell. 406.

Monday and Friday, he forfeits only what he has *purprised*, (or usurped.) But if he should hold it only on Friday, the whole would be forfeited, and a fine incurred.(1)

8. The subject of fairs is regulated by statute in the State of North Carolina.(2)(a)

9. In Massachusetts, legal fairs and markets were established by the colony laws, but the present opinion is, that none were continued under the laws of the Province or the Commonwealth.(3)

CHAPTER LXVI.

COMMONS.

1. Definition.
2. Origin and classification.
3. Inseparable from land.
5. *Improvement* by landlord.

7. Extinguishment.
8. Estovers—apportionment.
12. Right of common and common lands, in the United States.

1. THE *right of common* is an incorporeal hereditament, a right which one man owning lands has in the lands of another. The object is to pasture his cattle, provide fuel for his family, or repair his implements of husbandry.(b) It is a privilege annexed to the land, and which passes by a conveyance of it.(4)

2. By the ancient common law, where the lord of a manor enfeoffed another person of arable land, the latter acquired a right of common in the waste grounds, for the purpose of pasturage; for the reason that such pasturage was necessary for the support of cattle, without which the land could not be manured or ploughed. This right of common was called *common appendant*, and arose from *prescription*. Another right of common, termed *common appurtenant*, might be created by *grant*, or annexed to any land whatever, and authorized a tenant to put upon the waste land other cattle than those used for ploughing and manuring his arable land. The former right was favored, the latter discouraged, by the law.(5)

(1) Bro. Abr. *Franchise*, pl. 14, 22.

(2) 1 N. C. R. St. 282.

(3) 2 Dane, 615. See Spaulding v. Lowell, 23 Pick. 79.

(4) 3 Kent, 403; Trustees, &c. v. Robin-

son, 12 S. & R. 32; Finch's Law, 157. See Heath v. Elliott, 4 Bing. N. 388; 6 Scott, 172.

(5) 3 Kent, 403-4; Co. Lit. 86; 4 Co. 37 a; Bennett v. Reeve, Willes, 227. See Whitelock v. Hutchinson, 2 Moo. & R. 205.

(a) In Delaware, they are expressly abolished, as unnecessary, and the ancient franchises repealed for misuser. Dela. St. 233-7. In Maryland, they were suppressed by statute; but the act was repealed. Md. L. 1816, ch. 130. Fairs are recognized in Alabama. Aik. 409, n.

(b) A commoner may erect a house for his beast-keepers; so, also, a house for his *woodward*. Patrick v. Stubbs, 9 Mees. & W. 830.

To a declaration, which charged a pulling down a dwelling-house in which the plaintiff was then actually inhabiting, a plea, justifying the abatement of the house by a commoner, as a nuisance wrongfully erected upon the common, alleged that the defendant had notice, and was requested to remove his house, which he refused to do. Held, that the plea was an answer to the action. Davies v. Williams, 5 Eng. Law and Eq. 269.

3. The right of common of pasture is inseparable from the land; and, when the latter is divided, the former also attaches proportionably to the several parcels created by the division.(1)(a)

4. A owned forty acres, with a right of common appurtenant in two hundred acres. A sold five of the forty acres to B. Held, A and B had each a right of common proportioned to his ownership of the land.(2)

5. At common law, it was supposed that the landlord had no power to abridge the tenant's right of common by improving any part of the waste land, because it was a right issuing alike from the whole land. Statutes of Merton, 20 Hen. III, and Westminster 2, 13 Edw. 1, allowed him to do it, provided he left a *sufficiency* of common.(3)

6. If by express covenant a lessor convey to the lessee in fee common of pasture, and estovers, and afterwards cultivate or approve the manor land, so as to leave no common; this is no defence by way of off-set against a suit for rent, but the lessee must sue upon his covenant.(4)

7. If one owning part of the land, out of which the right of common arises, purchase a part of the land to which the right is incident; this produces a unity of possession by which the right is extinguished. If it were otherwise, the party might charge his right wholly upon the remaining land, which would be unequal and fraudulent. So, if one having common, in a tract owned by several, purchase a specific portion from one of them, the right becomes extinguished. The right shall not be so changed or modified by the parties, as to increase or even induce a temptation to increase the charge. An extinguishment as to a part of the land charged, is such as to the whole.(5)(b)

8. The subject of *estovers* has been already considered, in connection with the several estates to which they appertain. *Estovers*, it will be perceived, constitute a species of common, called *common of estovers*.

9. The principle of the English law is, that common of estovers cannot be apportioned; to prevent the land from being doubly or trebly charged. Thus, where the land descends to parceners, the whole common is allotted to the eldest, and the rest are entitled to contribution, or an allowance in another part of the land; or, if there be no other part, they are to enjoy the right alternately.(6)

10. The same principle applies to every common in gross and uncertain—as the right to cut wood and dig turf. Such right may be assigned, but not in such manner as to give the entire right to several persons, to be enjoyed by them separately. In the case of common of piscary, it is said, one parcener may have one fish, or one draught, and the other a second. In case of a mill, one may have the mill for a time; or one the first toll-dish, and the other the second.(7)

(1) Bennett v. Reeve, Willes, 227.

(2) Wilde's case, 8 Co. 78.

(3) 3 Kent, 406; Watts v. Coffin, 11 John. 495. See 9 Mees. & W. 830.

(4) Watts v. Coffin, 11 John. 495.

(5) 3 Kent, 407; Rotherham v. Green, Cro. Eliz. 593; Livingston v. Ten Broeck, 16

John. 14.

(6) Earl, &c. v. Mountjoy, Godb. 17.

(7) Co. Lit. 165 a; 3 Kent, 408.

(a) One commoner may sue separately for a disturbance of his right. Kenyon v. Nichols, 1 R. I. 106.

(b) Where a commoner used the land thirty years, with the exception of two, in which he had no cattle, held, he had gained a prescriptive right, under Stat. 2 & 3 Wm. IV, ch. 71; the interval of two years being merely a non-user, not an interruption, within the meaning of the act. Carr v. Foster, 3 Ad. & El. (N. S.) 581.

11. Where a lessee has the right of *estovers*, and the landlord, in order to defeat them, colorably leases all the unappropriated lands near; the tenant may resort to others more distant, and containing more valuable wood and timber. Under other circumstances, the law would not allow such use.(1)

12. Chancellor Kent says, the right of common is little known or used in this country, and probably does not exist in any of the northern or western parts of the United States, which have been settled since the revolution. The Chief Justice of Pennsylvania,(2) while he admitted that a right of common was an estate well known in the law, declared that he knew of very few instances of rights of common.(a) But the right is still known and enjoyed, and has been frequently a subject of litigation, in New York. In *Watts v. Coffin*,(3) there was a lease in fee, with a covenant for common of pasture and estovers, from the woods of the manor of Rensselaerwick, at Claverack. The waste and unappropriated parts of Claverack having disappeared by the settlement and improvement of the country, the question arose, but, in consequence of a decision upon another point, was left undecided, whether the right of common was not thereby destroyed. In *Livingston v. Ten Broeck*,(4) the principles stated in sec. 7 were recognized. In *Leyman v. Abeel*,(5) it was held, that, where a right of common descends to heirs, it cannot be divided, but there must be a joint enjoyment, by the heirs or their assigns; that they may alien jointly, but one tenant cannot convey alone, nor can the eldest take the whole, subject to contribution. In *Van Rensselaer v. Radcliff*,(6) it was held, that common of estovers cannot be apportioned, the effect of which would be to surcharge the land. Hence, where the party, by his own act, divides the land among several, the whole right is extinguished.

12 a. Lands claimed in ejectment were vacant and unoccupied, being waste, unimproved, and unenclosed commons, and had never been actually occupied by the defendant, or by those under whom he claimed, or at least not for forty years continuously, prior to the commencement of the suit. Held, the defendant had not such a possession as, independent of a valid paper title, would constitute a bar to the action.(7)

13. Although the interest in land, technically known to the English law as the *right of common*, is little known in the United States, yet, in all the States, it is usual for towns or other municipal districts to have some considerable tract of land, within their limits, for the public use of the inhabitants. The origin of this kind of commons is generally to be found in the grants or reservations of ancient proprietors, or the

(1) *Van Rensselaer v. Brice*, 4 Paige, 174.

(2) 3 Kent, 403; *Trustees, &c. v. Robinson*, 12 S. & R. 33. See *Carr v. Wallace*, 7 Watts, 394.

(3) 11 John. 495.

(4) 16 John. 14.

(5) 16 John. 30.

(6) 10 Wend. 639; acc. *Livingston v. Ketcham*, 1 Barb. 592.

(7) *People v. Livingston*, 8 Barb. 253.

(a) He also held, that the Statutes of Merton and Westminster, (referred to in sec. 5,) were not in force in Pennsylvania, and that the principle of them is not applicable to a case, where the legislature order the reservation of a precise quantity of land, as a common of pasture, for the use of purchasers of public lots. In such case, the act contemplates the future increase of inhabitants to be accommodated, and, therefore, whether the common is more than sufficient for present purposes, is an immaterial question.

early votes of towns.(a) Upon this subject, however, there are very few statutory regulations or judicial decisions. In Virginia, all unappropriated lands on the Chesapeake Bay, on the shore of the sea or of any river or creek, and the bed of any river or creek, in the east parts of the commonwealth, ungranted and used as common, shall remain so, and not be subject to grant.(1)

14. By the constitution of Illinois, all lands granted as a common shall ever remain such, with one or two exceptions.(2)

15. By a grant for common uses to a town,(3) the latter, it is said, becomes owner of the soil, and may make any use of it, not repugnant to the conditions of the grant; which will be strictly construed. But, where the proprietors of a township voted that a piece of land be left common for the use of the town, for building stones; held, this did not pass the fee, but merely the use for the object named.(4) And, where the legislature have ordered the reservation of a certain tract, for the common use of purchasers of lots, it is said the right of soil remains in the commonwealth, subject to the common, and may be conveyed with this incumbrance.(5)

16. In Massachusetts,(b) by a colony law passed in 1660, no cottage or dwelling-house could be admitted to commonage for wood, timber or herbage, or any other privilege, except such as were already erected, or should be entitled by consent of the town.(6)

17. It is said, the writ of *quo jure*, for disturbance of common, was never adopted in Massachusetts in form, but the principles of it, especially as to the plea of the defendant, are here in force.(7)

18. In Massachusetts, where distinct lots of land are enclosed, or agreed to be enclosed, in a common field, by not less than five proprietors, or where a majority in interest of such proprietors make application to court, and obtain an order for any enclosure, such proprietors may act as a *quasi corporation*, holding joint meetings, appointing officers, laying and collecting assessments, and ordaining rules as to the modes of improving the lands, and apportioning fences. Any proprietor, by abandoning the use of his land, may free himself from any future charges. If a proprietor put beasts upon the land, contrary to the rules, he is a trespasser; and they may be impounded. Any proprietor may enclose his land, but shall still contribute for enclosing the whole. A majority in interest, of the proprietors of a common field, may discontinue it at a general meeting. Three or more proprietors, by petition to the whole, or, in case of their refusal, to the Court of Common Pleas, may procure a separation of their part of the land from the rest, by a new fencing, to be made and maintained at the joint expense of themselves and the other proprietors, and may

(1) 1 Vir. Rev. C. 142.

(2) Constitu. of Illin., art. 8, sec. 8.

(3) Wellington, &c., 16 Pick. 99.

(4) Worcester v. Green, 2 Pick. 425. See

Cator v. Croydon, &c., 4 Y. & Coll. 405.

(5) Trustees, &c. v. Robinson, 12 S. & R. 32, 33.

(6) 2 Dane, 610.

(7) Ib. 611.

(a) In Connecticut, they are spoken of as lands *sequestered* for town commons. Con. St. 355.

(b) See Folger v. Field, 3 Cush. 336.

thereby constitute themselves a new body of proprietors, subject to the general law.(1)

19. The laying out of a public highway over such field constitutes a discontinuance of it, amounting to a declaration by the legislature that it shall no longer be fenced into one enclosure. A vote to dissolve or discontinue the field would have the same effect; so, also, it seems, an agreement by deed to discontinue it; or the grant of a way over it by the proprietors.(2)

20. Where land is laid out as a public common for the purpose of a court-house, this constitutes a perpetual dedication to the public; and the owner cannot reclaim the land, although it has ceased to be used for this object. But there can be no dedication, without an acceptance and use of the land by the public.(3)

20 a. Where a certain land was designated in the plat of a town laid out in 1796 as "the public square;" held, this was a dedication to the use of the town, not liable to be affected by any subsequent disposition of the original proprietor; and that one in possession, claiming under him, had no lien upon the land for the consideration money or improvements.(4)

20 b. It is no evidence of an intention to dedicate land to public use, that the proprietor joins in a petition for a town charter, extending the limits of the town over such land.(5)

20 c. The erection of a private building on land reserved as a public square, which has been illegally sold by the city authorities, is an indictable nuisance; and, the damage being irreparable, on a bill by the attorney-general, the court may grant a perpetual injunction.(6)

21. An interesting and important case in relation to common lands has recently been decided in Massachusetts.

22. In 1769, the proprietors of common lands in Cambridge voted, that all the common lands fronting the college should be granted to the town, to be used as a training field, and to be *undivided*, and remain for that use *forever*; and, if the town should dispose of them, or apply them to any other use, the lands to revert to the grantors. Highways were afterwards legally laid out over these lands. In 1830, an act was passed, authorizing certain inhabitants of Cambridge, at their own cost, and under the direction of commissioners appointed by the governor, to enclose such parts of the lands as the commissioners saw fit, and improve them by planting trees, laying out walks, &c., with the approbation of the selectmen, leaving foot-paths—the commissioners to alter at pleasure the direction of the roads which crossed them; the lands to be used for public purposes only, as a park, promenade, or for military trainings. Upon a petition for a mandamus to the county commissioners, who had refused to lay out a road over the common, the following points were decided: 1. The consent of the proprietors of the land, to the appropriation made by the act, might be implied as well as expressed, subsequent as well as precedent; and the petitioners, being strangers, could not object to the

(1) Mass. Rev. St. 359–62. Similar provisions in Connecticut, New Hampshire, Vermont and Maine. Con. St. 354; 1 Smith, 180; N. H. Rev. St. 277–81, 255; Maine Rev. St. 354, 223.

(2) Mansfield v. Hawkes, 14 Mass. 440.

(3) State v. Trask, 6 Verm. 355. See Klinkener v. School. &c., 11 Penns. 444.

(4) Huber v. Garley, 18 Ohio, 18.

(5) McLoughlin v. Stevens, 18 Ohio, 94.

(6) The Commonwealth v. Rush, 2 Harris, 186.

want of it. 2. The act was not unconstitutional, though there was no formal adjudication by the legislature, that the enclosure was of common convenience and necessity, they being bound to no particular form of enactment; nor because no compensation was provided for damage to private property, the land being already appropriated to public use; nor for want of any provision for repairing the new roads, to be laid out by the commissioners around the land, for these became at once highways, to be repaired by the town; nor because the word *forever*, used in the statute, precluded the legislature from any future action in relation to the land, thereby impairing the right of *eminent domain*; for the meaning of this term was, *until the public authority provided otherwise*. 3. The provisions in the statute, and enclosing of the land in three distinct parcels, were not repugnant to the clause in the proprietors' grant that it should remain undivided, the meaning of which was, *not allotted to the individual owners*; nor was such enclosure, with the authorized improvements, inconsistent with the clause in the grant that, unless the land should lie undivided and be used solely for a training field, it should revert to the proprietors; and therefore a forfeiture by the town, who consented to the enclosure. 4. The legislature having, by the act, annexed the character of public use to the property in question, a highway could not legally be laid out to destroy or interrupt it.(1)

23. It was further remarked by the court, that the laying out of a road over this land would be no forfeiture, as repugnant to the uses specified in the grant; if it would, then the roads which had already crossed it, and the very one prayed for, would have the same effect: and, further, that if the act was unconstitutional, it was therefore void, and the former highways were not discontinued.(2)

24. Where an act of the legislature directs that a town shall be laid out, and lots sold, reserving from the lots, *for the use of the State*, so much land as may be thought necessary for a court-house, jail, &c., "and without said town 100 acres *for a common pasture*;" the latter reservation is for the benefit, not of all the citizens of the State, but of the holders of the lots sold.(3)

25. Where the holders of lots, granted under the authority of the State, and for the benefit of which a common is reserved, acquiesce in the erection of a public building upon the common land; as the State might take such land for public uses, paying a compensation, the owners shall be regarded as having consented to receive their compensation in the benefits arising to them from the erection.(4)

(1) Wellington, &c., 16 Pick. 87.

(2) 1b. 100-2.

(3) Trustees, &c. v. Robinson, 12 S. & R.

(4) Trustees, &c. v. Robinson, 12 S. & R.

34.

CHAPTER LXVII.

OFFICES, ANNUITIES, LIGHTS, ETC.

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| 1. Offices.
2. Annuities.
3. Lights — general principles — ancient lights.
6. When protected, though not ancient. | 16. Privilege of lights, how lost.
18. Parties liable; amount of damage.
20. License to obstruct.
22. Other rights connected with buildings, walls, foundations, &c. |
|--|---|

1. By the English law, *offices* are a species of incorporeal hereditaments. An office consists in a right and correspondent duty to execute a public or private trust, and to take the emoluments belonging to it. In England, offices are the subjects of the same estates as other hereditaments. In the United States, offices cannot be regarded as hereditaments; never being held as inheritances, or even for life; but the most enlarged tenure of them being *for good behavior*. *Property* in an office is for the most part inconsistent with republican constitutions and principles. The English doctrine, however, seems to have been in a few instances recognized in this country. Thus, in North Carolina, (1) it has been held that a clerk's office, and others, held during good behavior, being a source of profit, are to some extent subjects of property; that in case of any usurpation or expulsion, an action lies for damages, and a *mandamus* to restore the party to his rights. So, in New York, a statute of 1787 re-enacted the provision of an old English statute, (2) that one disturbed in an office, held in fee or for life, may maintain the action of *novel disseizin*. But this provision is dropped in the Revised Statutes. They, however, adopt another ancient statute, which prohibits as a misdemeanor, the buying and selling, or deputation, of any office, or taking any fee or reward therefor, under penalty of losing the office. (3)

2. An *annuity* is a yearly sum, stipulated to be paid to another, in fee, for life, or years, chargeable only on the person of the grantor, and in this respect differing from a rent-charge. If payable to one and his heirs, it is a personal fee, an incorporeal hereditament, descendible, and forfeitable. The ancient remedy for an annuity was a *writ of annuity*; but in modern times this is superseded by an action of debt, or covenant. The heirs of the grantor of an annuity are bound, if expressly named—otherwise not. (4)

3. Another incorporeal hereditament, of an important character, is that of *light*, as incident to buildings. It is said by an ancient authority, "the lights are a necessary and essential part of the house;" (5) and the law has established definite rules both for the protection and limitation of this valuable privilege.

4. If a man purchase land adjoining his neighbor's, and build a house upon it, he can maintain no action against his neighbor for obstructing his light and air by a building; for he ought to foresee the probable use by his neighbor of the adjoining land, and by agreement, or a dif-

(1) Hoke v. Henderson, 4 Dev. 18, 19.

(2) Westmin. 2, 13 Edw. 1.

(3) 3 Kent, 453-4.

(4) Co. Lit. 144 b; Ib. 2 a; Nevil's case, 7 Co. 34 b.

(5) Palmer v. Fletcher, 1 Lev. 122.

ferent arrangement of his house, secure himself against future interruption and inconvenience.(1)

5. But where a house has lights which have existed *twenty years*, or *ancient lights*; the erection of another which obstructs them is ground for an action on the case or an injunction in Chancery.(a) The enjoyment of lights for twenty years raises a conclusive presumption in favor of the right, unless contradicted.(2)(b) But such use does not bind the owner of adjoining land, or preclude him from building so as to stop these lights, unless he had knowledge of their existence,(c) raising the presumption of a grant. The occupation of his land by a tenant is no sufficient ground for implying this knowledge.(3) Chancellor Kent remarks, that the English doctrine as to ancient lights can hardly be regarded as applicable to narrow lots in the new and growing cities of this country. The effect of the rule would be, greatly to impair the value of vacant lots, or those having low buildings upon them, in the neighborhood of other buildings more than twenty years old.(4)(d)

6. There is one case, where the law protects the enjoyment of lights,

(1) *Thurston v. Hancock*, 12 Mass. 220. See *Symmes v. Drew*, 21 Pick. 278; *Turner v. Sheffield, &c.* 10 Mees. & W. 425; *Duke, &c. v. Tennant*, 10 Eng. L. & Equ. 237.

(2) *Wright v. Freeman*, 5 Har. & J. 477; 12 Mass. 220; *Story v. Odin*, Ib. 157.

(3) *Daniel v. North*, 11 E. 372.

(4) 3 Kent, 446, n.; (*Hoy v. Sterrett*, 2 Watts, 331.)

(a) But no injunction will be granted against a lessee's obstructing lights in the house leased, unless the injury would be irreparable or incapable of compensation. *Atkins v. Chilson*, 7 Met. 398.

Where ancient lights are obstructed by the erection of a fence, in a place claimed by the proprietor of the lights as a public highway; equity will not order a perpetual injunction against the party erecting such fence, till it has settled by a trial at law, whether the place is a highway, or is on the respondent's own land. *Irvin v. Dixon*, 9 How. 10. It seems a temporary injunction might issue, if there were danger of irremediable injury to the plaintiff's property. Ib.

(b) By St. 2 & 3 Wm. IV, ch. 71, twenty years' use gives a title to lights, unless there be an interruption of one year. *Flight v. Thomas*, 11 Ad. & El. 688. Under the same act, the use of lights for twenty years gives a title to them, although by the verbal permission of a third person. *Corporation v. Pewterer*, 2 Moo. & R. 409. Under the provision of the same act, that a use for this period shall give a title, notwithstanding any inconsistent local custom, is included a custom in London to darken windows by building upon an old foundation. *Salters'*, &c. v. *Jay*, 3 Ad. & El. (N. S.) 109.

If the occupier of a house pay rent, under a parol agreement, to the owner of the adjoining land, for the liberty of keeping windows open, looking upon the land; after twenty years enjoyment of the lights, he will acquire the right to such enjoyment, and the owner of the land cannot, after that period, obstruct such lights, as the payment of the rent is not an interruption under the statute, 2 & 3 Will. IV, c. 71, sec. 3. *Plasterers, &c. v. Parish, &c.*, 6 Eng. Law and Eq. 481.

(c) Where servitudes of light and way in favor of an adjoining estate are apparent, and necessary for the use and occupation of the dwelling thereon, the purchaser of the lot on which they are established will be held to have known of their existence, and bound to take the lot subject thereto. *Durell v. Boisblanc*, 1 La. Ann. R. 407.

(d) In Connecticut, an adverse right to lights and windows cannot be acquired by use in any city. St. 1845, 35. So, in Massachusetts, without restriction to cities. St. 1852, 825. It is doubted, whether the enjoyment of air and light over the land of another is an easement in his land, by the laws of New York. *Bank, &c. v. Americans*, 4 Sandf. Ch. 438.

So, in Maine, a party may legally erect a building upon his own land, immediately adjoining the land of another, and put out windows overlooking the latter; and a continuance of the use of such windows, uninterrupted for twenty years, will not give him any additional right, so that he can maintain an action against the owner of the adjoining land, for obstructing such lights by buildings erected on his own land. *Pierre v. Fernald*, 26 Maine, 436.

But if the person so putting out windows could acquire the right to maintain them unobstructed by use, he could not while he himself was in the possession of the adjoining land as tenant of the owner. Ib. See Rev. Sta. c. 147, sec. 14.

though not ancient. Thus, if a man owning a house and adjoining land sell the former, he cannot *in derogation of his grant* erect upon the latter any building which will obstruct the lights of the house. The principle is thus stated by Lord Holt. "If a man have a vacant piece of ground, and build thereon a house with lights, and lets this house to another; and afterwards he builds on a contiguous piece of ground, or lets the contiguous ground to another, who builds thereon, to the nuisance of the lights of the first house, the lessee of the first house shall have an action on the case against such builder, &c.; for the first house was granted to him, with all the easements and delights belonging to it."⁽¹⁾

7. The defendant built a house, and let it to the plaintiff, and would then go to stop up the lights. Held, he was liable, as for a nuisance.⁽²⁾

8. This principle, it is to be observed, is applicable, not only to the vendor of two adjoining estates himself, but to a purchaser from him of the land upon which the building is erected that obstructs the lights. The earliest case upon the subject was of this latter description. A man erected a house, and then sold it to one person, and the adjoining land to another, who, with piles of timber, obstructed the lights of the house. It was held, that an action would lie.⁽³⁾

9. The dwelling-house of the plaintiff, and the lot of the defendant, upon which the building complained of was afterwards erected, were sold at auction at the same time, to the plaintiff and defendant respectively. The house was conveyed to the plaintiff "with all the lights, easements, rights," &c., and bounded on the east by a piece of ground, described in the particulars of sale, as a piece of freehold *building ground*, purchased by A, the defendant. Till within a year of the sale, a one story building had stood upon the defendant's ground, which obstructed the lower windows of the dwelling-house; but a year previously it had been pulled down. The defendant having built a house which obstructed both the lower and upper lights of the plaintiff; held, the authority to obstruct the plaintiff's lights, given by the terms *building ground*, must be confined to such a building as before stood upon the defendant's ground; and that the latter was bound to have made inquiry as to the extent of his rights.⁽⁴⁾

10. A range of buildings was begun to be built on speculation at Clifton, called the *Royal York Crescent*; but the building was afterwards discontinued. They were afterwards put up at auction under certain printed conditions, and a part of them sold; and subsequently the remainder was sold in lots. A purchased one house, and the defendant another, adjoining, and A leased to the plaintiff for years. A condition of sale provided, "that the several dwelling-houses, areas in front of each house, paved terrace, carriage ground, and void ground, should be immediately laid out, and formed at the expense of the purchasers, according to the plan, (which was produced at the sale,) and that there should be no coach-house, stable or other building on the north side, more than 20 feet high, nor any shops or dwelling-houses erected on

(1) *Palmer v. Fletcher*, 1 Lev. 122; *Swansborough v. Coventry*, 9 Bing. 305; *Story v. Odin*, 12 Mass. 157; *Rosewell v. Pryor*, 6 Mod. 116.

(2) *Cox v. Matthews*, 1 Vent. 237.

(3) *Palmer v. Fletcher*, *1 Lev. 122.

(4) *Swansborough v. Coventry*, 9 Bing. 305.

said gardens; and the whole to be completed within two years from the day of sale." After two years, the defendant erected an additional room at the back or north side of his house, one side of which was formed by carrying up his part of the wall which separated the gardens behind. The wall was so built, as to incline, as it extended, from the defendant's garden, towards the plaintiff's, making an acute angle with the back of his house, and diminishing his light. The plan did not specify the height of the garden wall, nor was it built at the time of sale. At the time of sale, the spaces intended for back windows were actually opened in the walls. Held, this purchase must be regarded as subject to the implied condition that the windows should not be obstructed; and that this condition was binding not only upon the original owner, but upon his lessees; that the height of the walls was to be regulated by mutual convenience, and neither party could raise his wall so high as to obstruct another's light; that the defendant could not rightfully go beyond the object of a garden wall; and that, under the circumstances, the short period of the plaintiff's enjoyment was immaterial.(1)

11. In 1795, the town of Boston sold to A, the plaintiff, a lot of land, upon which was a two-story building, with a door in each story, opening into a vacant lot of the town, which was encompassed by the plaintiff's building, and other buildings of the town, but was open on the side facing the market. The yard was used, by permission, by the occupants of the buildings, for purposes of storage and passage. A erected upon his land a new building, upon the same foundation, and having the same doors and windows, with the old one. In 1812, B, the defendant, purchased the vacant ground, and erected a building which obstructed the air and light of A's doors and windows. Held, A might maintain an action against B.(2)

12. Where the vacant land is sold first, and the building having lights, afterwards, by the same vendor, it is left doubtful upon authority whether the above principle applies. In the early case of *Palmer v. Fletcher*, Kelynge, J., (who dissented,) said that, in such case, the lights might be stopped; but Twysden, J., the contrary, and cited a case so adjudged. But all agreed that the principle does not apply to a stranger.(3)

13. The principle above stated is not extended beyond the case where two interfering buildings are claimed under one grantor.

14. A was party to a deed, which conveyed to B a house with windows, adjoining land of A, and by this deed A conveyed a part of this adjoining land to B. He also witnessed, without objection, the erection of the house. Held, this transaction involved no license or covenant, which prevented A from obstructing B's windows.(4)

15. A licenses B to build to the extremity of B's ground, adjoining A's, reserving to himself the right of building to the extremity of his own ground, at pleasure. A may thus build within twenty years, though he thereby renders B's house damp, dark and untenable.(5)(a)

(1) *Compton v. Richards*, 1 Price, 27.

(2) *Story v. Odin*, 12 Mass. 157.

(3) 1 Lev. 122.

(4) *Blanchard v. Bridges*, 5 Nev. & M. 567.

(5) *Ib.*

(a) It has been suggested (sec. 5) that the common law upon this subject has not been adopted in all its strictness in this country. It is said that it was inapplicable to the condition of the country when settled by the colonists, and formed no part of the law in force

16. The right to lights depends upon occupancy. Hence, if the proprietor abandon such occupancy, absolutely and decisively, manifesting no intention to resume it, in reasonable time, he loses his right in less than twenty years. Thus, if he build a blank wall to his house, where the lights formerly existed, this is an abandonment which wholly extinguishes his title.(1)

17. The right to ancient lights may be lost by the mode of enjoying them. A had a barn, in the side of which, adjoining B's land, were openings, by which the barn was chiefly lighted. A converted the building into a malt-house, and the openings into windows. B erected a fence before them, which obstructed the light. In an action by A against B, held, B might prove that the *change* in A's mode of enjoying the light had been prejudicial to B.(2)(a)

18. In regard to the parties who are liable for the injury of obstructing lights, it has been held that the original contractor for the building which creates the obstruction, and a clerk, who superintended the erection, and directed the workmen, may be joined in suit.(3)

19. With respect to the amount of injury caused by obstructing ancient lights, the question is, whether, in consequence of the obstruction, the plaintiff has less light than before, to so considerable a degree as to injure his property in point of value. The loss of a look-out or a prospect is not sufficient. To sustain the action, there must have been a considerable obstruction of light, and not the mere taking off of a ray or two. Evidence may be offered, of a change in the angle at which the light enters the rooms, in consequence of the obstruction.(4)(b)

19 a. Where a party, who has a right to the access of light and air through enlarged ancient windows, makes an alteration in the size of his windows, so as to exceed the limits of his ancient rights, he thereby acquires nothing in addition to his former right; and, if the excess cannot be obstructed by his neighbor, in the exercise of his lawful rights on his own land, without, at the same time, obstructing the

(1) *Moore v. Rawson*, 3 Barn. & Cr. 332.

(2) *Garritt v. Sharp*, 3 Ad. & El. 325.

(3) *Wilson v. Peto*, 6 Moo. 47.

(4) *Pringle v. Wernham*, 7 Carr. & P. 377 ;

Wells v. Ody, Ib. 410; *Parker v. Smith*, 5 Ib. 438. See *Embrey v. Owen*, 4 Eng. 2 & Equ. 466.

here on the 19th of April, 1775. *Myers v. Gemmel*, 10 Barb. 537. And this change of the common law doctrine has been applied in the case last considered, of successive grants by the same grantor.

An owner of two adjoining lots in the city of New York, upon one of which was a building, deriving its light and air, over and through an open space in the rear of the other lot, into which the windows of the building opened and looked; leased the building and lot for a term of years, with its appurtenances, without reserving to himself a right to build on such other lot, or stop or darken the windows of the building leased; and afterwards built a house, covering the whole open space of the other lot, darkening the windows, and excluding the light and air from the building occupied by his tenants. Held, he might lawfully darken or stop the windows by any erection on the other lot; that such an act was not in derogation of his own grant, and he could not be restrained by injunction from *sind o g*. Ib.

(a) Where A conveys to B a tenement adjoining his own, expressly stipulating, that if B shall alter the buildings or erect new ones, he shall not build nearer than a certain line to the tenement of A, but prescribing no limit as to height; B may lawfully increase the height of his building, though he thereby interrupts the access of light and air to the windows of the other house. *Atkins v. Bordman*, 2 Met. 457.

(b) Where A had enjoyed a window more than thirty years, with an outside shutter to close it, and a proposed erection would obstruct the light and the shutter; a bill for an injunction was dismissed. *Wilson v. Cohen*, *Rice*, 80.

ancient right; such party must be considered, as having, by his own act, suspended, and lost for the time, his former right.(1)

19 *b*. A, being the owner of a house in which there were ancient windows, rebuilt it within twenty years, and in so doing raised it a story, putting windows in the new story, and altered the position of, and enlarged the lower windows, so that portions of them occupied spaces where there had before been no aperture. B, who occupied a house separated from A's by a passage belonging to A, also rebuilt and raised his premises, within twenty years after the rebuilding of A's house, and thereby obstructed the windows in the upper story of A's house, as well as those in the lower stories. Held, in an action against B for this obstruction, that B was justified in so obstructing the new lights, and that A could not complain that, as a necessary consequence, the privileged windows were also darkened. Held, also, that this defence was well raised, under a traverse of the plaintiff's right to the windows.(2)

20. We have already had occasion to consider the subject of a *license*, in relation to land. A case is here added which has peculiar reference to *lights*.

21. A having a house which he was altering, his wife wrote to B, the owner of adjoining grounds, as follows: "Before the last coat of paint is put on the side wall, we wish to place a window in it, and it can be finished more neatly, with your permission, to place the necessary ladder, &c. The motive for doing this is, that I should gain a more cheerful view," &c. B answered, "you are welcome to place a ladder in my grounds, near your house," taking care not to injure the shrubs. A made the window, B being absent at the time. B afterwards wrote to A, expressing his dissatisfaction, and erected a wall, which obstructed the light and air of the window, and which A threw down. Held, the letter of A's wife asked for a license only to place a ladder in B's grounds, and the letter of B merely gave permission so to do; that, although there might be a view to an ulterior object, it was not to be presumed that B approved of that object, not knowing its nature and extent, the dimensions or situation of the proposed light; but that B's subsequent letter, written after the making of the window, had no bearing upon the case.(3)

22. In addition to the more common kinds of easements already treated of, Chancellor Kent refers to the class of *urban and rural servitudes*; and remarks, that, although recognized by the common law, these are chiefly illustrated and explained by the civil law.(4)

23. One of the class of *urban services*, is the right of *support*; by which one man, either by contract or prescription, claims to rest the timbers of his house upon the walls of another adjoining owner.(5)

24. Another service is the right of *drain*, by which the water is allowed to fall from the house of one upon the land of another; and the right of *drain*, that is, of carrying water through another's land.(6)(a)

(1) Renshaw v. Bean 10 Eng. Law & Eq. 417.

(2) *Ib*.

(3) Bridges v. Blanchard, 1 Adol. & El. 536.

(4) 3 Kent, 435.

(5) *Ib*.

(6) *Ib*. 436. See City, &c. v. Shaw, 1 Met. 130. St. Lewis v. Gurno, 12 Miss. 414.

(a) The owner of two adjoining messuages and lots, one occupied and the other leased by him, constructed a drain from one through the other into a common sewer, and suffered his

25. These servitudes or easements must be created by the owner, and one tenant in common cannot establish them without consent of the others. The exercise of them may be limited to certain times. Thus, the right of drawing water from a neighbor's well may be confined to certain hours; or a right of passage, to a part of the day.(1)

26. Party-walls are mentioned as another class of easements.

27. Where such wall exists between two buildings, belonging to different persons, if one of them takes it down with his building, he must re-erect it in reasonable time and with the least inconvenience. The other owner shall contribute to the expense, if the wall required repairs; but he cannot be charged with the expense of a wall more costly than the former one.(2)

28. The owners of a party-wall, built at joint expense, are not tenants in common, but each owns his own land, with a right to use the wall, which he may enforce by action. But the common use of a wall is *prima facie* evidence of a tenancy in common.(3)

29. Another important subject connected with adjoining ownership of land and buildings, is the right of one owner to take down his building and excavate the soil, or to do the latter act alone. Although by these acts the other building is injured or endangered, this furnishes no ground of action, provided reasonable notice was given, and proper care used in the operation, which is a question for the jury. It is otherwise, however, where an adjoining owner claims under a grant or an ancient or prescriptive right pertaining to the building or the foundation. This title limits and controls that of his neighbor. So where the wall of the house taken down has long supported the beams of the other house; this may give a right to have the beams inserted in the new wall.(4)(a)

(1) 3 Kent, 436.

(2) *Ib.* 436-7. See *Weld v. Nichols*, 17 Pick. 538; *Murly v. M'Dermott*, 8 Ad. & Ell. 138.

(3) *Matts v. Hawkins*, 5 Taun. 20; *Cubitt v. Porter*, 8 Barn. & Cr. 257.

(4) *Peyton v. St. Thomas, &c.*, 9 Barn. & Cr. 725; *Massey v. Goyder*, 4 Carr. & P. 161;

Wyatt v. Harrison, 3 Barn. & Ad. 871; *Jones v. Bird*, 5 Barn. & Ald. 837; *Richart v. Scott*, 7 Watts, 460; *Dodd v. Holme*, 3 Nev. & M. 739; 1 Ad. & Ell. 473; *Trower v. Chadwick*, 3 Bing. N. C. 334; *Partridge v. Scott*, 3 Mees. & W. 220; *Bradbee v. Governors, &c.*, 2 Dowl. P. C. 164; *Davis v. London, &c.*, 2 Nich. & C. 308.

tenants to use it more than ten years. He afterwards sold the adjacent lots to different persons at the same time, not mentioning in the deeds any right of *drain*. Held, one of the purchasers might close up the drain of the other's lot which passed over his land, if by reasonable labor and expense another might be made elsewhere. *Johnson v. Jordan*, 2 Met. 234.

The occupant, not the owner of land, is bound to repair drains and sewers. Hence, in a suit by an adjoining owner for non-repair thereof, the declaration must allege occupation by the defendant. *Russell v. Shenton*, 3 Ad. & Ell. (N. S.) 449. See *Bell v. Twentyman*, 1 Ib. 766. A right to empty a town drain upon the land of an individual cannot be acquired by twenty years' use, unless the drain be one and the same, and the use uninterrupted. Enlarging, deepening, or changing the course and termination of the drain will prevent the acquisition of such right. *Cotton v. Pocasset, &c.*, 13 Met. 429.

So, one who enters a drain from his cellar into a town drain, which is afterwards enlarged, deepened and varied in its course and termination, and who subsequently deepens his cellar, and lays the drain therefrom deeper than it was before, and enters it into the altered town drain, cannot acquire a right thus to drain his cellar, by a use of the town drain for less than 20 years after the alteration. *Ib.*

A reversioner may maintain an action against one who erects upon his house eaves and a pipe, overhanging and conducting water upon land occupied by a tenant of the plaintiff. *Tucker v. Newman*, 4 Perry & Dav. 14; 11 Ad. & Ell. 40.

(a) In Pennsylvania, it is held, that where the owner of two adjoining lots builds thereupon, he is bound to use proper materials and reasonable skill. If he does not, and the wall

30. The ancient rule upon these subjects is as follows: (1) If A be seized in fee of land adjoining land of B, and A erect a new house, a part of which is on his boundaries next to B's land, and B dig his land so near the foundations of A's house, that thereby the foundation and the house itself fall into the pit; yet A has no action against B, because it was his own fault that he built so near B's land; for he, by his act, cannot hinder B from making the best use of his own land. But, *semble*, that a man who has land next adjoining my land cannot dig his land so near mine, that thereby my land shall go into his pit. Lord Tenterden says, that the owner of premises, adjoining those pulled down, must shore up his own in the inside, and do everything proper for their preservation. But the omission to do this does not necessarily defeat the action, if the work be done irregularly and improperly, in a wasteful, negligent and improvident manner, so as unnecessarily to increase the plaintiff's risk. (2)

31. A declaration alleged, that the plaintiffs were possessed of a vault, and of certain wine therein; that the defendant was about to pull down and remove, and did pull down and remove, certain other vaults and walls, next adjoining the plaintiff's vault; and therefore was bound, in the event of his not shoring up or protecting said vault, to notify the plaintiff of his intentions, that the plaintiff might thereby protect his own property; and also to pull down and remove the vaults and walls with such care and skill, that the plaintiff should not be injured thereby. Held, the defendant was not bound to shore up the plaintiff's vault, to notify him of his intentions, nor, in the absence of any knowledge on his part as to the existence and situation of the plaintiff's vault, to use such care and skill in the operation, as would prevent injury to the plaintiff. (3)

32. A owned a building, the footing of one of the walls of which supported one of the walls of an adjoining house, belonging to B. A, being about to pull down and remove the foundations of his house, notified B of his intention, and used reasonable and ordinary care in the work, but took no measures to preserve B's building, although the nature of the soil required him to lay the new foundation several feet deeper than the old. Held, A was not liable for an injury hereby caused to B's house. (4)

33. Action on the case by A, the owner of a leased house, against B, the owner of the adjoining house, for an injury by the pulling down of B's house. It appeared that the two houses were very old and decayed, and the party-wall between them weak and defective. For some time, pieces of timber, called *struts*, had been carried across H. lane, on

(1) *Wilde v. Minsterley*, 2 Rolle Abr. *Trespass*, 1, pl. 1.

(2) *Walters v. P'ail*, 1 Moo. & M. 362.*
See *Davis v. London, &c.*, 1 Mann. & G. 799.

Willoughby v. Middlesex, &c., 8 Met. 206.

(3) *Chadwick v. Trower*, 8 Scott, 1; 6 Bing. N. C. 1.

(4) *Massey v. Goyder*, 4 Carr. & P. 161.

* In a note to this case it is suggested, that where an injury complained of would have had no existence whatever, had it not been for the conduct of the plaintiff, no action will lie. Otherwise, where the conduct of the defendant is such, that ordinary care would not prevent some injury, though the amount was mainly owing to the plaintiff's misconduct.

the east side of which B's house stood, to the opposite house on the west side of the lane. A's house adjoined B's, eastward; and the *struts*, in sustaining B's, also supported A's. When B's house was taken down, the *struts* were necessarily removed, and no others substituted, extending from A's house, to the house across the lane, nor any upright shores placed in A's house to sustain the floors and roof, either of which measures would have answered the desired end. A's house consequently parted from the house adjoining it on the east, became unsafe to inhabit, partly fell or was taken down and rebuilt. B gave no notice that he was about to pull down the house, but both parties knew the defective state of the houses. There had been previous discussion between them, especially with regard to the party-wall, and the statutory notice of rebuilding it had been given, but within the time fixed B's house was taken down. The taking down was done by day, and A's tenant must have known of it. Held, in the absence of evidence of a grant to A of a right to the support of the adjoining house, he was bound in law to make use of shores within.(1)

34. In an action on the case the declaration alleged, that A was lawfully possessed of a dwelling-house, adjoining a dwelling-house of B, and that B dug into the soil and foundation of the latter so negligently, and so near A's house, that the wall of this house gave way. Upon demurrer to that part of the declaration which alleged the digging *so near*, &c., the defendant had judgment. The question was stated to be, whether, if one builds to the extremity of his own land, the adjoining owner may dig the ground there so as to remove some of the soil which supported the building. It was suggested, that if the building were an ancient one, or if it did not increase the weight upon the soil of the party erecting it, an action might lie. But one is not to be debarred from digging his own soil, because his neighbor's will then become incapable of supporting an artificial weight.(2)

35. A, the owner of a lot within six feet of Christ's Church in New York, built more than thirty-eight years before, commenced the erection of a building thereupon, to be six stories high; and was sinking the foundation sixteen feet deep, and ten feet lower than that of the church. The wall of the church, at the corner opposite to which the excavation had been completed, had so settled as to leave a considerable crack. The proprietors of the church filed a bill for injunction, stating these facts, and that the church was in great danger if the work proceeded; but not that the defendant was improving his property in an unreasonable or unusual manner, or with any intention to injure the church, or that the plaintiffs had any claim by prescription, or grant from the defendant. Upon an application to dissolve the injunction which had been granted; held, although one has a right to the use of his land in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots, this right does not extend to artificial erections. The injunction was accordingly dissolved.(3)

36. In 1802, A, the plaintiff, purchased land on Beacon Hill, in Boston, which has a rapid declivity on all sides. In 1804, he erected a brick dwelling-house and outhouses on this lot, and laid his foundation, on

(1) *Peyton v. Mayor, &c.*, 9 Barn. & C. 725.

(2) *Wyath v. Harrison*, 3 Barn. & Ad.

(3) *Lasala v. Holbrook*, 4 Paige, 169.

the western side, within two feet of his boundary line. The inhabitants of Boston then owned the hill west of A's lot; and, in 1811, sold it to B, the defendant. B levelled the hill, by digging and carrying away the gravel, within five or six feet of A's line; and, in consequence, by reason of the slope of the hill, the earth fell away, leaving A's foundation wall, in some places, bare, and obliging him, for safety, to remove, and take down and re-build the house. B was notified of the danger, and that A would claim damages. Held, though B was liable for the direct consequential damage to A, in the loss of, or injury to *the soil*, he was not answerable for the adventitious damage arising from his putting his house in a dangerous position.(1)

37. The cases above stated seem to settle the law upon the subject under consideration. There is an ancient case, which seems to favor a different doctrine.

38. A brought his action against B, declaring that he was seized of a dwelling-house, *lately built*, and that B had a house next adjoining, and, in making a cellar under his (B's) house, dug so near to the foundation of A's house, that he undermined it, and one-half of it fell. Judgment for the plaintiff.(2) Upon this ancient case, it is remarked,(3) that the right of action was not objected to, but only the form of declaring; and that the report is very short and unsatisfactory, it not appearing, whether B dug merely on his own land, or whether A's house was on a new or an old foundation.

39. In a recent English case, the exception to the rule, arising from acquiescence on the part of the plaintiff, was considered.

40. In 1803, the house of A, the plaintiff, was built against the pine end wall of the house of B, the defendant, by permission. In 1829, B made an excavation in a careless and unskilful manner, in his own land, near this wall, thereby weakening it and injuring A's house. Held, both the express permission and the long acquiescence gave A a right of action; and that the declaration, alleging ownership of a house, belonging to and supporting which, were certain foundations, was well supported, as it intended only an *easement* in such foundations.(4)

41. In the case of *Lasala v. Holbrook*,(5) the Chancellor remarks, that where buildings have been granted in their present situation, by owners of adjacent lots, or by those under whom they have derived their title; the general principle does not apply, but the owner of the building is entitled to full protection against the consequences of any new excavation, or alteration. To this point he cites several English cases, all of which, however, relate to *the obstruction of lights*, and have been referred to under that head. Perhaps, by analogy, they fully sustain the Chancellor's position. In *Thurston v. Hancock*,(6) Parker, Ch. J., places the analogous exception of a *right by prescription*, upon the ground of presumed grant *from the ancestor of the man who ob-*

(1) *Thurston v. Hancock*, 12 Mass. 220.

(2) *Slingsby v. Barnard*, 1 Rolle's R. 88.

(3) 12 Mass. 227.

(4) *Brown v. Windsor*, 1 Crompt. & Jer. 20.

(5) 4 Paige, 173.

(6) 12 Mass. 225.

structs the privilege. This was a case, as has been seen, of injury to a building by excavation of the adjoining soil.(a)

(a) In the cities of New York, Philadelphia and Washington, party-walls and buildings are specially regulated by statute. 3 Kent, 438; Penn. St. 1838-9, 92. As to the effect of a *city custom* upon this subject, see *Bradbee v. Governors, &c.*, 2 Dowl. P. C. 164.

There is no duty or obligation on the owners of adjoining building lots in a city, to unite in building a party-wall on the dividing line. *Sherred v. Cisco*, 4 Sandf. 480.

If the owner of a city lot, on building upon it, place half of the wall upon the adjoining lot; the owner of the latter is not liable to contribute towards the expense of the wall, upon his subsequently using, in his own erection, the part which stands upon his own land. *Ib.*

Where a party-wall jointly built by two adjoining owners, one-half on the land which each owns in severalty, is destroyed; there is no obligation resting upon either to rebuild it, or, to unite in building another party-wall. *Ib.*

The parties, uniting in building a party-wall, at their mutual expense, do not thereby become tenants in common of the wall, much less of the land upon which it is erected. *Ib.*

Each owns, in severalty, the portion of the wall situated on his own land, with no qualification, except that neither has a right to pull it down without the other's consent. *Ib.*

A party-wall, built at the joint expense, being destroyed by fire, the owner of one of the two lots proceeded, without the agreement or concurrence of the owner of the other, to build a new wall on the site of the old. The owner of the other lot subsequently built on his lot, and rested his beams on the new wall. Held, that he was not liable to contribute any portion of the expense of erecting such wall. *Ib.*

The fact, that one-half of the wall stands upon the adjoining lot, is not notice of any lien for the cost of its erection, in favor of the neighboring owner, who erected it. *Ib.*

A, who had extended a party-wall, sued B,—who had used the wall, having bought the lot next to A, though after several conveyances of A's,—for half the price of the wall. Held, A's right to recover was not barred by the act of April 10th, 1849, in Pennsylvania, which passed the rights of the party-wall to the purchaser, as his right had accrued before the act was passed. *Dannaker v. Riley*, 2 Harris, 435.

Where a husband erected a house on land conveyed to him and his wife and the heirs of his wife, and the party-wall was used by the person building on the next lot; held, that the husband and his creditors were entitled to the compensation for using such wall. *Davids v. Harris*, 9 Barr, 501.

Under this class of easements, may be included the mutual and respective rights of parties in an open and public space, used for their joint accommodation. It is held, that, where two persons own two lots respectively, bordering on the inner angle of a *public square*, the privilege of erecting steps, porches, cellar doors, &c., upon the pavement of the square, applies, as well to the side as to the front of each lot, but cannot be exercised by one so as to obstruct the free use of the pavement by the other. *Rutter v. Fidler*, 1 Jones, 181.

CHAPTER LXVIII.

RIVERS, ETC., OWNERSHIP OF THE SOIL.

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|---|------------------------|
| 1. The sea and navigable rivers. | 18. Alluvion. |
| 5. Rivers not navigable. | 19. Islands. |
| 11. Grant of land upon a river. | 21. American doctrine. |
| 17. Change in the course or width of a river. | |

1. It is said, the owner of land bounding upon the sea, or other navigable water, where the tide ebbs and flows, owns to ordinary high-water mark. The soil below this belongs to the public, not subject to the interference of the crown, even in England; unless there is an individual title, by grant or prescription. The *sea-shore*, according to Lord Hale, is the ground between ordinary high and low-water marks; and *prima facie*, and of common right, belongs to the king, but may be vested in a subject by prescription or grant; as by the grant of a manor, *cum littore maris eidem adjacente*. But such grants are construed most favorably for the king or government, as a trustee for the public, and strictly against the grantee. So, after a grant on a navigable river, measures may be adopted to improve the navigation, though productive of remote and consequential damages to the banks. It is held in New York, that the public has no right to use and occupy the soil of an individual, adjoining navigable waters, as a public landing and place of deposit of property in its *transit*, against the will of the owner; though such user has been continued more than twenty years. Such user neither raises the presumption of a grant, thereby giving a prescriptive title, nor proves a dedication to the public use. In Pennsylvania, it is decided, that the right of exclusively navigating a public river can be acquired only by public grant, not by prescription; and also, that owners of the shore have control of the landings, even though they make the termination of public roads; but the right to use such landings may be established by long custom. In Maryland, the State may grant the soil covered by navigable waters, subject to the rights of fishing and navigation.(1)(a)

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| (1) 3 Kent. 427, 431-2; Rex v. Smith, Doug. 425; 5 Rob. Adm. 182; Hale, <i>de Jure Maris</i> , ch. 4, 5; Williams v. Wilcox, 1 Wilm. & H. 477; Water Com'rs, 3 Edw. 290; Pearsall v. Post, 20 Wend. 111; Bird v. Smith, 8 Watts, 434; Wilson v. Inloes, 11 Gill & J. | 351; Middleton v. Pritchard, 3 Scam. 520; Cox v. The State, 3 Blackf. 196; Hagan v. Campbell, 8 Por. 9; Mayor, &c. v. Eslava, 9, 577; Littlefield v. Maxwell, 31 Maine, 134; Gough v. Bell, 2 N. J. 441; 1, 156. |
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(a) A grant from the United States, since the admission of Alabama into the Union of lands in Alabama below high-water mark, is void. Goodtitle v. Kibbe, 9 How. U. S. 471.

The legislature of New Jersey have the right to grant and aliene lands under water in navigable rivers, bays, and arms of the sea, they being a part of the public domain. Gough v. Bell, 1 New Jersey, 156.

A grant, by the legislature, to numerous individuals, authorizing them to fill up, in front of their lands, the land under the water of a river or bay, to a fixed exterior line, is a grant to each of the shore proprietors, in severalty, of such right, to the extent of the land under water in front of his own shore. O'Donnell v. Kelsey, 4 Sandf. 202.

In order to ascertain the boundary line, between such proprietors, in the made land, the whole of the old and the whole of the new line, are to be taken into consideration, so that each may have his due proportion of water-front. Ib.

The rule, that, in determining the right to land, made from the bed of a river or bay, the boundary line, between co-terminous proprietors on a curved shore, shall equally divide the

2. Lord Coke says, there may be a *movable freehold*; an instance of which is a grant of the *sea-shore*; which passes an ownership that varies with the rise and fall of the tide.(1)(a)

3. In New Jersey, it is held, that a grant bounded on navigable water reaches to high-water mark when the tide is high, and to low-water mark when it is low; and that the grantee may improve and build upon the intermediate space.(2)

4. Chancellor Kent doubts the existence in law of any such unstable title as that above referred to.(3)

5. The owner of land upon a river not navigable, or above tide-water, owns to the centre of the stream, subject to the public right of passage, as upon a highway. He may make any use of the soil or the water, not inconsistent with this common privilege; and neither the State nor an individual has any right to divert the stream to his prejudice.(4)(b)

6. Small streams, which cannot naturally be used for boating, though made boatable by the owner's improvements, are private property, and not public highways. So a creek in a salt marsh is not *navigable*, unless it may be navigated generally and commonly, not merely at unusu-

(1) Co. Lit. 48 b; *Scrutton v. Brown*, 4 B. & C. 485; *Hollister v. Union, &c.*, 9 Conn. 436.

(2) *Arnold v. Mundy*, 1 Halst. 1.

(3) 3 Kent, 431.

(4) *Ib.*: 3 Ohio, 496; *Wright v. Howard*, 1 Sim. & St. 190; *Luce v. Carley*, 24 Wend. 451; *Varick v. Smith*, 9 Paige, 547; *Williams v. Buchanan*, 1 Ired. 535; *State v. Gilmanton*, 9 N. H. 461; *Knight v. Wilder*, 2 Cush. 199.

angle of indentation, is incapable of application, where the shore is curved diagonally, and the outer or permanent line is straight. *Ib.*

The law gives no fixed and certain mode of drawing the boundary line in such a case. It only lays down a general principle, which is, that each riparian proprietor shall receive his rateable share of front on the outer, or new water line, and, that the question whether the boundary lines between co-terminous proprietors are to be drawn at right angles, or divergent, or convergent to the shore, depends on the consideration, whether the new exterior line equals, exceeds, or falls short, of the old shore line. *Ib.*

The settlement of the actual boundaries between co-terminous proprietors of water lots to whom a grant of the land under water, in front of such lots, is subsequently made, is a question of much difficulty; and a mode of division, which, under some circumstances, would be perfectly fair and equitable, would, under others, be directly the reverse. *Ib.*

In this point of view, the practical location, by the proprietors themselves, of their respective boundaries, is entitled to great weight, and, where a mode of division has been generally adopted, no single individual of them ought to be allowed, causelessly, to disturb it. *Ib.*

Certain upland was conveyed, adjoining easterly upon a river, where the tide ebbed and flowed, one of the side lines running at a right angle with the river, and the other, so as to leave the land towards the river of less extent than at the other end, "together with all the flats and water privileges adjoining to, being at and having, the width of the easterly end of the said land, as bounded by the river aforesaid." The bank of the river, at that place, was convex. Held, that the extent and position of the flats was to be determined, by drawing a straight line from the south-east and north-east corners of the land, at high-water mark, and extending lines from the east of that line, and at right angles with it, from high to low-water mark. *Kennebec, &c. v. Breadstreet*, 28 Maine, 374.

(a) The bank of a river is that which contains the water at its greatest height. "*Ripa ea putatur esse, quæ plenissimum flumen continet.*" Dig. 43, 12, 3, 1; 3 Kent, 424. The shore (or more properly bank, (*ripa*), it having no *littus*) of a fresh water river, is where the land and water ordinarily meet; the water's edge or margin of the stream. *Child v. Starr*, 4 Hill, 376; 6 Cow. 547. In Louisiana, the *sea-shore* is the land covered by the sea at the highest water in winter. Civil Code, art. 442. A beach is the space between high and low-water mark. *Cutts v. Hussey*, 3 Shepl. 237. See *Clowes v. Back*, 7 Eng. L. & Equ. 42.

A conveyance of land bounded by the shore transfers the property only up to the line, and not that which lies beyond it. *Lincoln v. Wilder*, 29 Maine, 169.

(b) A mere intruder upon land cannot avail himself of this principle. His possession is limited to actual occupancy. *Watkins v. Holman*, 16 Pet. 25.

ally high tides, to some purpose useful to trade or agriculture. It is not sufficient, that it will float a small boat at high water.(1)

7. A riparian proprietor may, by clear and specific boundaries, sell his upland to the top or edge of the bank of a river, and reserve the stream or the flats below high-water mark. In such case, the purchaser takes the bank as it is, or may afterwards be by alluvion or decrease of the flow of the river. An owner may also convey the bed of a stream, distinct from the land that bounds it.(2)

8. Streams above tide water, if *long used* for the passage of boats, rafts or timber, though not *public rivers*, become *public highways*,(a) and any obstruction of them is a nuisance.(b) The distinction between naviga-

(1) *Wadsworth v. Smith*, 2 Fairf. 278; *son v. Hathaway*, 15 John. 447; 3 Kent, 433
Rowe v. Granite, &c., 21 Pick. 344. —4; *Den v. Wright*, 1 Pet. Cir. 64.

(2) *Storer v. Freeman*, 6 Mass. 435; *Jack-*

(a) Rivers of public use in transportation of property, being subservient to commerce, are things of common right, under *servitude* to the public interest, and public highways. *Spring v. Russell*, 7 Greenl. 290.

(b) Though a bill in equity, for an injunction against a public nuisance in *navigable waters*, will not generally be sustained, in favor of a private individual; yet, where a party will sustain an injury distinct from that done to the public, and especially if it be irreparable, and a court of law cannot afford adequate remedy, this relief will be granted. *Frink v. Lawrence*, 20 Conn. 117.

A and B were owners of contiguous lots, bounded easterly by a harbor; A's lot lying south of B's. A owned a wharf, extending from his land into the harbor, at the further end of which was a short wharf at right angles with the principal one, the whole being in the form of a—|. This wharf, on the north side of it, where vessels principally lay, was a safe and convenient one, and much resorted to. B was about driving a connected row of piles from the south-east corner of his land to the north-east end of A's wharf, in such a manner as to entirely obstruct the passage of vessels, from the waters of the harbor to the north side of A's wharf; which would greatly impair the value of his property. This obstruction was not contemplated by B, as part of a wharf which he intended to construct adjoining his land. On a bill in equity, brought by A against B, to restrain him from making such obstruction, held, A was entitled to the relief sought. *Ib.*

The public benefit, arising from the construction of a bridge over a navigable river, is no defence to a bill in equity for an injunction to abate it, as an obstruction to the free navigation of the river. [Daniel, J., dissenting.] *Pennsylvania v. Wheeling, &c.*, 13 How. U. S. 518.

An action on the case for a nuisance cannot be sustained, unless the plaintiff shows a particular injury to himself, distinct from that which he suffers in common with the rest of the community. *Seeley v. Bishop*, 19 Conn. 128.

Therefore, where a dam in a navigable creek, by means of which the plaintiff was prevented from passing along such creek, from his residence above to his land below, and the converse; held, that this obstruction was not the subject of a private action. *Ib.*

But when an individual suffers special damage by an obstruction of a navigable river, he may have civil redress by a suit, though the obstruction be authorized by a State, if it is contrary to, or conflicts with, some clause in an act of Congress, such as a coasting license. *United States v. New Bedford Bridge Co.*, 1 W. & M. 401.

A building which extends into the harbor of Boston, beyond the commissioners' line established under the Massachusetts acts of 1837, c. 229, and 1840, c. 34, and which is also below low-water mark, and an obstruction to the navigation; is a public nuisance, notwithstanding it was erected previous to the passing of those acts. *Garey v. Ellis*, 1 Cush. 306.

The navigation, the obstruction of which is a public nuisance, is on waters whereon the public pass and repass, with vessels or boats, in the prosecution of commerce essentially valuable. *Wethersfield v. Humphrey*, 20 Conn. 218.

The only mode of punishing acts as crimes, which obstruct the navigation of rivers and ports within the limits of a State, and are not now crimes under the laws of a State, or the United States, is by further legislation by Congress, under its authority to regulate foreign commerce, and that between the states, declaring what obstructions shall be penal, if not removed or modified, and in what court the offence shall be tried. *U. S. v. New Bedford, &c.*, 1 W. & Min. 401.

Where a highway, laid out to furnish access to a ferry, passed over the neck or mouth of Keeney's cove, a body of water setting up from Connecticut river; it was held, that the laying out was not exceptionable as an obstruction to navigation. *Wethersfield v. Humphrey*, 20 Conn. 218.

ble rivers and private rivers is, that the former are *presumed* to be open to the public, while the latter are presumed not to be; but the presumption may be rebutted by usage. It was early held in Massachusetts.(1) that navigable waters are a common privilege for passing on them; but, in case of a river not navigable, though convenient for boats and rafts even many miles above the spot in question, if the owner of the adjoining shore build a bridge across, he may have trespass against an individual who throws it down.(2)(a)

9. Where a river is obstructed by a dam, if an owner of logs floating therein suffer them to remain stationary, and obstruct the stream, he may have trespass against one who pushes them over the dam, and along the river; because the facts negative a highway by usage.(3)

10. Where the owner on each side of a river erects hydraulic works, both are entitled to use equal shares of the water.(4)

11. Upon the principle above stated, the grant, either private or public, of land bounded on a river, or upon its margin, or along the river, above tide water, passes a title to the middle of the stream, including the water, the bed, and all islands; unless there be an express reservation, a clear declaration or intention, or a certain and immemorial usage, to the contrary, or unless such construction is negatived by prior grants on the other side.(b) Thus, it was early held in Massachusetts, that a sale *to the river* passes the stream and mill-site to the centre. So, where tenants in common, by partition, assign to each the land on one side of the stream, each owns to the centre. In a later case in the same State the court remark, that one owning *to the bank* of a river owns to the middle; but, if the owner of the land *bounds his grant of it by the bank*, the stream is excluded. From the apparent incompatibility of these two propositions, it has been inferred, that the latter must be intended to apply to such case only, where the river is *reserved*, or by plain expression or implication excluded from the grant. And the authority of the case is questioned, as a guide for the decision of any other.(5)

12. If a grant is bounded by visible and permanent monuments, such

(1) 2 Dana, 696.

(2) *Berry v. Carle*, 3 Greenl. 269. See *Bradley v. Rice*, 13 Maine, 201; *Morrison v. Keen*, 3 Greenl. 474; *Horne v. Richards*, 4 Call, 411; *Warner v. Southworth*, 6 Conn. 471; *Gavit v. Chambers*, 3 Ohio, 495; *Williams v. Buchanan*, 1 Ired. 535; *Starr v. Child*, 20 Wend. 149; *Water Commissioners*, 3 Edw. 290; *Gold v. Carter*, 9 Humph. 369.

(3) *Ib.*

(4) *Arthur v. Case*, 1 Paige, 448.

(5) *Jennings*, 6 Cow. 549; *Hayes v. Bowman*, 1 Rand. 417; 3 Kent, 427-32; *Canal, &c. v. People*, 5 Wend. 423; *Mayo v. Quinby*, 3 Dana, 4; *King v. King*, 7 Mass. 406; *Hatch v. Dwight*, 17 Mass. 289; *Starr v. Child*, 20 Wend. 149; *Canal, &c. v. Haven*, 5 Gilm. 548; *Lincoln v. Wilder*, 29 Maine, 169.

(a) The public have the same right to travel on the *ice* of a navigable river, as a highway, that they have to travel on the waters of the river. *French v. Camp*, Maine S. J. C. June, 1841; *Law Rep.* Sept. 1841, p. 200.

The public having appropriated a tract on such ice for a road, any person who wantonly or carelessly obstructs the same, or cuts a hole therein, is liable for any damage thereby caused to passengers. *Ib.*

The right set up by a citizen of the United States, to navigate certain waters, is an abstract one, which Chancery will not interfere to protect. *Spooner v. McConnell*, 1 McLean, 338.

(b) After such grant from the State, the grantee's right cannot be abridged by a subsequent public declaration, establishing the stream as a navigable river. *Covert v. O'Connor*, 8 Watts, 470. See *Louisville v. Bank, &c.*, 3 B. Monr. 143. A grant "bounded east by the River Mobile," passes the land between high and low-water marks. *City, &c. v. Emanuel*, 1 How. 95

as a tree or fence, near, but without the edge of a river, the river is excluded.(1)

13. Grant from the State, bounded as follows: "Beginning at a hemlock tree, standing by the south side of the river A, thence south, &c., to another hemlock tree, also standing by said river, thence south-eastwardly, and bounding by said river to the first mentioned bound." A question arose whether the grant included an island, on each side of which the river ran, and which lay between the two trees named, and nearest to the shore conveyed by the grant. Held, as in this case there were two channels, the grant was meant to extend to that channel, which would include the island; that the boundary by the two trees, one standing on the *south side* of the river, and the other *by the river*, would reach to the centre of the stream; and that bounding *by the river* did not intend the edge of the river on which the trees stood(2)

14. Grant from the State of a tract, beginning at a tree standing *not far* from a river; thence running down the river by course and distance, but obliquely, from the river, so as to leave a triangular piece of land between the boundary and the river. Held, the course of the river should control the course specified.(3)

15. Where land is granted, fronting on and bounded by a river, the side lines are to be continued to the main stream, though they thereby cross a point formed by the junction of one of its branches with the main stream. If, in a conveyance of premises upon the bank of a river not navigable, the lines are stated to run from one of the corners of the lot to the river, and thence along the shore of said river to a certain street; the grantee takes "*ad filum aquæ*."(4)

15 *a*. Conveyance of 20,100 acres of land on the west side of Genesee River, bounding it easterly "on the bank of the river, agreeable to the traverse," and reserving "out of the above-described lands one hundred acres, which is conveyed by deed to A, and is to be laid out in a square form, as near as the traverse of the river will admit, and the said A's mill to be the centre of the eastern boundary." Held, the reservation was part of the premises granted, and the whole tract, including the one hundred acre reservation, was bounded by the bank, not by the thread of the stream.(5)

15 *b*. In a grant by the United States of land bordering on a stream not navigable, the minutes in the surveyor's office showed that the stream was meandering, but there was no marked line upon the plat by which the grant was made limiting the grant to the margin of the stream. Held, the grantee took to the centre thread of the stream, and the meandered line, run for the purpose of determining the quantity of land in the fraction, was not a boundary.(6)

16. Where the same person owns on both sides of a river, not navigable, he also owns the whole river, so far as his lands extend.(7)

17. Where a river, not navigable, changes its course or width, if it gain upon one bank gradually and imperceptibly, the owners on both sides still continue to own to the centre; if suddenly, the centre of the

(1) Ang. on W. C. 6.

(2) Lunt v. Holland, 14 Mass. 149.

(3) Harramond v. McGlaughan, Tayl. 196; Ang. 2.

(4) Graves v. Fisher, 5 Greenl. 69; Starr v. Child, 20 Wend. 149.

(5) Starr v. Child, 5 Denio, 599.

(6) Canal, &c. v. Haven, 5 Gilm. 548.

(7) 3 Kent, 427.

river remains as before, with reference to their relative title, and in this way one may come to own the whole stream.(1)

18. If soil be formed out of the sea, or a river, by slow and imperceptible *alluvion* and accretion, whether by the water's retiring, or a slow deposit of sand, &c., it belongs to the owner of the adjoining land.(2)(a)

19. The ownership of *an island* in a river belongs to the owner of the land on that side of the river to which it is nearest. If the centre of the stream passes through the island, the owners are entitled, accordingly, to portions of it in severalty.(3)

20. Where one-fourth of a stream, in which was an island, flowed on one side of it; held, the owner of the shore on the other side was entitled to the whole of three-fourths of the river. And, if an island in a river not navigable divides the channel, and lies partly on each side of the thread of the river, the opposite proprietors will own it respectively according to the original thread of the river.(4)

21. The principles of the common law, above stated, have been recognized in many of the United States,(5) and probably are in force in all of them, with the exceptions which will be presently noticed.(b) In

(1) 3 Kent, 427; King v. Yarborough, 3 Barn. & Cr. 91. See Municipality, &c. v. Orleans, &c., 18 Louisi. 122; City, &c. v. Holland, Ib. 286; Pulley v. Municipality, &c., Ib. 278; New Orleans v. U. S., 10 Pet. 662; Murry v. Sermon, 1 Hawks, 56.

(2) Ib.; Girard v. Hughes, 1 Gill & John. 249; Handly v. Anthony, 5 Wheat. 380; Ingraham v. Wilkinson, 4 Pick. 273; Hagan v. Campbell, 8 Por. 9.

(3) 3 Kent, 428; King v. Smith, Doug. 441; Middleton v. Pritchard, 3 Scam. 520; Grant v. Davidson, 16 Conn. 512.

(4) Crooker v. Bragg, 10 Wend. 260; Deer-

field v. Arms, 17 Pick. 41.

(5) Berry v. Carle, 3 Greenl. 269; Morrison v. Keen, Ib. 474; Proprs, &c. v. Carlton, 2 N. H. 369; King v. King, 7 Mass. 496; Lunt v. Holland, 14 Ib. 149; Ingraham v. Wilkinson, 4 Pick. 268; Adams v. Pease, 2 Conn. 481; 6 Ib. 471; 6 Cow. 518; Palmer v. Mulligan, 3 Caines, 318; People v. Platt, 17 John. 195; Hooker v. Cummings, 20 Ib. 90; Arnold v. Mundy, 1 Halst. 1; Hayes v. Bowman, 1 Rand. 417; Mead v. Haynes, 3 Ib. 33; Howe v. Richards, 4 Call, 441; Browne v. Kennedy, 5 H. & J. 195.

(a) Whether arising from natural or artificial causes, as, *e. g.*, the erection of wharves, affecting the natural action of the water. Adams v. Frothingham, 3 Mass. 363. See 8 Por. 9. Riparian proprietors are in general entitled to land formed by alluvion, according to the following rule. Measure the whole of their old line on the river, and ascertain the number of feet owned by each; divide the new river line into equal parts, appropriating to each proprietor a number proportional to his number of feet on the old line. Then draw lines from the points at which the proprietors respectively bounded on the old, to those thus settled as the points of division on the new shore. Deerfield v. Arms, 17 Pick. 41.

But where the old margin has deep indentations or sharp projections, the general available line on the river is to govern, and not the actual length of the margin, as thus elongated. Ib. Where a deed calls for a line on the bank of a river, which is afterwards changed by excessive floods; the boundary remains unaltered. Lynch v. Saunders, 4 Dev. & B. 62. Where a bank is enlarged by the sudden casting up of sand, &c., the addition belongs to the public. 8 Por. 9. If land is granted upon the shore, but with other fixed bounds, no right can be gained by alluvion. Mayor, &c., v. Eslava, 9, 577.

Upon a division among heirs, a lot was assigned to A, bounding upon a beach, A giving to the others the right to take seaweed thereon. The boundaries having gradually shifted by the action of the sea; held, this right was not thereby affected, but might still be exercised anywhere below the land bounding on the beach. Phillips v. Rhodes, 7 Met. 322.

The territory of the State of Delaware within "the twelve miles' circle" extends across the Delaware River to low-water mark on the Jersey shore; and the title to the Pea Patch Island, which was formed of alluvion and deposit in the river, was in the State of Delaware, and, by cession, passed to the United States. The Pea Patch Island, Wallace, jr., Appendix, 9.

(b) But see Bowman v. Wathen, 2 M'L. 376. In Massachusetts, it is said, there is no statute of the Commonwealth or Province, nor ordinance of the Colony, which alters the common law as to rivers not navigable, except in regard to the fisheries. Cook v. Hull, 3 Pick. 271.

Connecticut, Swift, Ch. J., remarks, that a more perfect system of regulations on this subject could not be devised. It secures common rights as far as the public interest requires; and furnishes a proper line of demarkation between them and private rights.(1)

22. By the ordinance relating to the Northwest Territory, it is provided *unalterably*, that the navigable waters, leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free.(a) But this provision does not affect the common law rule of ownership by the proprietors of the respective banks to the thread of the river; nor impair the rights of State legislatures to improve the navigation of such waters by drawbridges, canals, railroads and turnpikes, and imposing tolls in connection therewith.(b) But it is held, that Congress cannot validly grant the shore of a navigable river.(2)

23. It is stated as the settled law in Connecticut,(3) resting on the same ground of general usage, which is at the foundation of the common law, that the owner of land upon a navigable river has an exclusive right to the soil between high and low water marks, for the erection of wharves and stores. Such owner is not understood to be *seized*, but to have a *right of occupation*, or *franchise*. And he may maintain ejectment.

24. But it is also held,(4) that the seaweed accumulating *below low-water mark* belongs to the public, not to the owner of the bank.(c) Daggett, J., says, the common law doctrine, that the right to the soil of the proprietors of land on navigable rivers, extends only to *high-water*

(1) *Adams v. Pease*, 2 Conn. 483.

(2) 3 Kent, 427, n; *Gavit v. Chambers*, 3 Ohio, 490; 1 McL. 337; 9 Por. 577; *Palmer v. Cuyaboga, &c.*, 3 McL. 226.

(3) *East Haven v. Hemingway*, 7 Conn.

186, 202; *Nichols v. Lewis*, 15, 137.

(4) *Chapman v. Kimball*, 9 Conn. 38. (See *Marcey v. Darling*, 8 Pick. 283.)

(a) A statute of Alabama makes the same provision as to all rivers actually navigable. The title to the beds of such rivers is in the public, unless expressly granted. *Bullock v. Wilson*, 2 Por. 436. The eastern channel of the Mississippi River, between Bloody Island and the main land, is in fact, and within the meaning of the law, navigable, and a part of the common highway; and an obstruction thereof is a public nuisance. *The People v. St. Louis*, 5 Gilman, 351. Although the several States bordering on the Mississippi River may change its current, or even fill up some of its navigable channels, whenever they find it necessary to their own well-being, taking care to leave a free navigation; yet individuals have no such right; and, where such act is done by an individual as would amount to a nuisance in a navigable river, although a sufficient navigation is left to the public, still, a court of equity cannot inquire whether the act is for the public good, but must abate the nuisance. *Ib.* In Maryland, a patent may be granted for land under navigable water, subject to navigation, &c. *Baltimore v. M'Kim*, 3 Bland, 467, 473. One owning land upon tide water has no pre-emptive right to take contiguous marsh. *Ib.*

(b) By successive acts of Congress, all the navigable waters in the Western States and Territories are declared public highways. 3 Kent, 427, n. Grants on the Ohio river are held to pass a title to low-water mark. So on the Mississippi River, subject to the public right of navigating and fastening to the shore, notwithstanding the treaties and statutes, declaring it a free highway. *Middleton v. Pritchard*, 3 Scam. 520; *Morgan v. Reading*, 3 Sm. & M. 366. It is held, that a grant, by the government or its grantee, of land on the Ohio River, ceded by Virginia in the territory of Indiana, passes a title to low-water mark. *Stinson v. Butler*, 4 Blackf. 285. The shores of the Ohio River, between high and low-water marks, belong to the owners of the adjoining lands. *Blanchard v. Porter*, 11 Ohio, 138.

Where the width of a street marked by right lines is given in a town-plat, surplus land between the street and the low-water mark of a river is not thereby dedicated to the use of the town. *McLaughlin v. Stevens*, 18 Ohio, 94. See *Rowan v. Portland*, 8 B. Mon. 232.

(c) See Vol. I, p. 63. In Maine it is held, that neither by the ancient ordinance nor the common law, can one person take *muscle-bed manure* from another's land between high and low-water marks. *Moore v. Griffin*, 9 Shepl. 350.

mark, is the law in Connecticut, for there is no statute abrogating it. The adjoining proprietors, indeed, have the right to the shore, subject to the paramount right of the public. The usage for them to wharf out against their own land has never been disputed. The interests of navigation have been subserved, and the consequences have been salutary. On the death of the owner to high-water mark, his estate in the shore, and the erections upon it, has descended to his heirs. This is our common law, founded on immemorial usage.

25. In Maine and Massachusetts, it is the established rule, that the owner of land, bounded upon navigable water, has a title to the shore between high and low-water marks, subject to the public right of passage, and provided the space does not exceed one hundred rods. And the flats are so far incident to the upland, that if a *lost deed* of the latter is presumed, the former will pass without proof of possession by the grantor, unless it be proved that the titles have been separated by alienating one without the other.(1)(a) This rule is founded upon a colonial ordinance of 1641, which, though subsequently annulled, thenceforward became the established law in Massachusetts. Under this rule, the space between high and low-water marks may be built up with wharves, provided they do not obstruct navigation.(b) But a wharf extending into the channel, in Boston harbor, has been held indictable as a nuisance.(2)(c) The whole of a navigable river, included within high-water mark, on each side, is a *highway*, not lawfully to be obstructed. And a grant, or prescription, to build upon the flats, is upon the implied condition of not obstructing navigation.(3)(d)

(1) *Storer v. Freeman*, 6 Mass. 435; 2 Dane, 693-4; *Ingraham v. Wilkinson*, 4 Pick, 268; *Barker v. Bates*, 13, 255; *Lapish v. Bangor, &c.*, 8 Greenl. 85; *Sale v. Pratt*, 19 Pick. 191; *Valentine v. Piper*, 22, 85; *Green v. Chelsea*, 24, 71; *Parker v. Cutler, &c.*, 7 Shepl. 353. See Mass. St. 1852, 852.
(2) *Com. v. Wright, Jurist*, No. 6, 185; *Rex v. Grosvenor*, 2 Star. 511.
(3) *Kean v. Stetson*, 5 Pick. 492.

(a) The owners of upland, to which flats adjoin, may sell the upland without the flats, or the flats without the upland. *Deering v. Longwharf*, 25 Maine, 51.

(b) So in Connecticut; the object of the law conferring this right, being to benefit commerce. *Frink v. Lawrence*, 20 Conn. 117.

(c) In Connecticut, it is a nuisance to obstruct or divert any stream, &c., to the injury of any person, without license from the town, where such town has the right of granting it. Conn. St. 1821, 362.

(d) One who erects a wharf below low-water mark, without authority from the legislature, gains no possession or color of title beyond the land under water actually covered by the wharf, nor any exclusive right to use, by way of appurtenance to the wharf, the open space by the side of it, for the purposes of a dock. *Gray v. Bartlett*, 20 Pick. 186. The space in question being a public domain, by thus using it with the assent of any individual, the builder does not gain an easement as against the latter. *Ib.* So the owner of flats, by covering the whole of them to low-water mark with a wharf, does not claim the right to lay vessels upon the flats of an adjoining owner. Hence, the silence of the latter, during the erection of the wharf, is no evidence of his implied assent to such a claim. *Ib.* See *Hagan v. Campbell*, 9 Por. 9; *Fitchburgh, &c. v. Boston, &c.*, 3 Cush. 58.

Where owners of land, bounded upon tide waters, extend a wharf beyond low-water mark, they are liable therefor only to the sovereign power, and, although such extension may be an injury to land adjoining, the owners cannot, on that ground, recover damages. *Gerrish v. Proprietors, &c.*, 26 Maine, 384.

The owner of flats may lawfully erect wharves upon them, for his own use and benefit; but the public have the right, equally with him, to pass and repass with vessels and boats upon and over the water, where there is no occupation with wharves and buildings. *Deering v. Long Wharf*, 25 Maine, 51.

Where an act of the legislature authorized a proprietor of lands in Brooklyn, lying on the East River, which is an arm of the sea, to construct wharves and bulkheads, in the river, in front of his land; and there was, at that time, a public highway through said land, ter-

26. Chief Justice Parsons states, as the reason for the modification of the common law above referred to, in Massachusetts, that the first settlements were made on harbors, or arms of the sea, that the erection of wharves was very important for commercial purposes, but the colony was itself too poor to build them, and, therefore, by this ordinance, encouraged individuals to do it.(1) Chief Justice Shaw mentions the point as *a curious subject of investigation*. He remarks, that by the common law, the king held the right of property to high-water mark, in trust for the subjects, and therefore could not grant it to one of them. But this restriction could not apply to grants of foreign domains, to large companies, obviously made for political objects, the accomplishment of which necessarily required a portion of the sovereign prerogatives. Hence, the charters of such companies granted not only the soil, but also "all havens, ports, rivers, waters, *royalties*," &c., clearly including the right and jurisdiction of the crown in the sea-shores. It seems best to have suited the views of the colonists here, to treat the soil of the sea-shores, and flats, as the property of the riparian proprietor, subject to certain modifications; because such has been the uniform practice. In Massachusetts, an ordinance was accordingly passed.

(1) *Storer v. Freeman*, 6 Mass. 438. See also remarks of Judge Parker, 1 Pick. 182.

minating at the river; held, upon such proprietor's filling up the land, between the former termination of the street and a bulkhead erected by him in the river, the street was, by operation of law, extended from such former termination, over the newly-made land, to the water; that he had not the right to obstruct the public right of passage over the same to the water; and that, by so obstructing such passage, he was guilty of a nuisance. *The People v. Lambier*, 5 Demio, 9.

In New Jersey, the riparian proprietors, who have constructed wharves, docks, &c., between high and low water marks, in front of their own upland, not prevented by the State, and without injury to navigation, are entitled to the improvements and the land covered by them; and the State cannot grant the land or improvements, or appropriate them to public uses without compensation. *Gough v. Bell*, 2 N. J. 441.

An owner of flats cannot claim title beyond a creek in which the sea ebbs and flows, and from which the tide does not wholly ebb. *Sparhawk v. Bullard*, 1 Met. 95. Under the above-named ordinance, the ebb of the tide, when from natural causes it ebbs the lowest, not the average or common ebb, is to be considered as low-water mark. *Ib.* See *Dawes v. Prentice*, 16 Pick. 435.

Conveyance of two lots of land, bounding them by "the harbor of Edgartown," the grantor agreeing to lay out a way between them, leading towards the harbor, for the use of the town. Held, the flats in front of the lots passed by the deed, though the description, both as to the quantity of the land and length of the lines, would be satisfied by applying it to the uplands above. *Mayhew v. Norton*, 17 Pick. 357. Devise of "a beach for drift-wood and timber," the testator owning also the adjoining upland. Held, this passed the soil above ordinary high-water mark, up to the line to which sea-weed and driftwood are usually floated in ordinary seasons by the highest winter floods, but not so as to include land occasionally overflowed in extraordinary inundations. *Brown v. Lakeman*, 18 Pick. 444. In Alabama, it is held, that a grant of land upon a river must extend either to high or low water mark, not to a point between. *Hagan v. Campbell*, 8 Por. 10.

The right to use the waters, covering flats between high and low water marks, for the purposes of navigation, was not abridged by the ordinance of 1641 upon that subject; and owners of vessels have a right to pass over such flats, and to remain on them, for commercial purposes, from the ebb to the flow of the tide. *Gerrish v. Proprietors, &c.*, 26 Maine, 384.

Where flats appurtenant and incident to upland, are taken for a railroad, the commonwealth has no interest therein by way of easement, which requires the damages for taking the same to be assessed in the manner provided by the Rev. Sts. c. 24, secs. 48, 49, 50, where there are several parties having several estates or interests, at the same time, in the land taken. *Walker v. Boston, &c.*, 3 Cush. 1.

And, though none such has been found in Plymouth,^(a) yet a uniform usage of two centuries is sufficient proof, that the rule was adopted by the proper authority as a law.⁽¹⁾

27. The language of the ordinance referred to is, "all creeks, coves, and other places, about, and upon salt water, where the sea ebbs and flows." Hence, it applies to the shores of the open sea, as well as to bays, coves and rivers. It also applies, wherever the tide ebbs and flows, though it be fresh water thrown back by the influx of the sea.⁽²⁾

28. It will hereafter be seen, (see *Fishery*,) that the common law rule, as to the right of *fishery*, is modified in the States of Pennsylvania and South Carolina,^(b) in relation to large rivers, actually, though not technically, navigable. The same modification would seem applicable to the ownership of the stream itself, which must, therefore, belong to the public, not to the riparian proprietor. So, in North Carolina and Alabama, it is held, that the *navigability* of a river does not depend on the ebb and flow of the tide; but any stream, navigable by sea-vessels, is in law a *navigable river*, and the owner of the land owns only to low-water mark.^{(3)(c)}

(1) *Barker v. Bates*, 13 Pick. 259-60.

(2) 13 Pick. 529-60; *Lapish v. Bangor, &c.*, 8 Greenl. 85; *Sale v. Pratt*, 18 Pick. 191.

(3) *Carson v. Blazer*, 2 Bin. 475; *Shrunk*

v. President, &c., 14 S. & R. 71; *Cotes v. Wadlington*, 1 M'Cord, 580; *Wilson v. Forbes*, 2 Dev. 30; *Ingram v. Threadgill*, 3, 59; *Bullock v. Wilson*, 2 Por. 436.

(a) The marginal note in 8 Greenl. 85, states the ordinance as limited to *Plymouth Colony*. Chancellor Kent says, though originally limited to *Plymouth*, yet the doctrine of it is held in Massachusetts. 3 Kent, (3d ed.) 429, n. a.

(b) In this State, it is said, on the one hand, that the rule, by which no river is navigable above the tide, will not do in a State, whose rivers are navigable several hundred miles above the tide; and, on the other, that no river can be considered as navigable, the natural obstructions of which prevent the passage of boats of any description.

(c) In Pennsylvania, owners on the Delaware and Schuylkill Rivers have a title to the land between high and low-water marks, subject to the public right of passing when it is covered by water. *Ball v. Slack*, 2 Whart. 508. So on the Ohio River. *McCulloch, &c., v. Aten*, 2 Ohio, 307. *Blanchard, &c. v. Porter*, 11, 138. By compact between Pennsylvania and New Jersey, the Delaware River remains a highway for both States; they exercising concurrent jurisdiction on its waters, and each having the exclusive regulation of the fisheries annexed to its own shore. By a like compact between New York and New Jersey, the centre of the Hudson River is the boundary line, but New York has exclusive jurisdiction over the river and bay, excepting the wharves and improvements on the Jersey shore, while the sound between Staten Island and New Jersey, with similar reservations, is subject exclusively to New Jersey. Rights of property in each State reach to the middle of the rivers. *Elmer*, 562; 3 Kent, 427, n.

The proviso, in the Pennsylvania and New Jersey act of 1771, sec. 7, by which those States, in declaring the Delaware River a common highway, and authorizing the improvement of it by commissioners, provided that no power given by the act should give power "to remove, throw down, lower, or impair, or in any manner to alter" certain mill dams, nor to obstruct, or "in any manner hinder" the owners of them, or "their heirs or assigns, from taking water out of the said river for the use of the said mills;" is not a grant of the water to the owners of such mills, but the toleration of a nuisance, and a mere license to the mill-owners, revocable at pleasure, to use the water. *Rundle v. The Delaware, &c., Wallace, Jr.*, 275.

The Potomac River is held to be *navigable* above the flow of the tide. *Binney*, 2 Bland, 123. The subject is regulated by compact between Maryland and Virginia. *Ib.* A Statute of Maryland—1745, ch. 9, sec. 10—provided, that all improvements made out of the water, or where it usually flows, should be the right of the improvers, their heirs, &c. Held, applicable only to improvements *in front of an owner's own lot*; and, in case of conflict between riparian proprietors, arising from curvature of the shores, that the elder patent would have priority. *Wilson v. Inloes*, 11 Gill & J. 351. See further, as to what constitutes a navigable river, *Charlestown v. County, &c.*, 3 Met. 202; 21 Pick. 344.

In New Hampshire, a statute prohibited the construction of a bridge so as to impede navigation. At the place where a bridge was built, the river was from 5 to 27 feet deep, but it

29. But in New York,^(a) the common law principle, of private ownership to the centre of the stream, has been applied to the Hudson

did not appear to have been ever used for commercial purposes, nor was it shown that the bridge would impede the use of the river for boats or rafts. Held, the act did not apply to this bridge. *State v. Gilmanton*, 14 N. H. 467.

In Maine, riparian proprietors own to the thread of fresh water rivers, &c.; the rights of public use in navigable rivers have never been carried so far as to place fresh water streams on the same ground with those on which the tide ebbs and flows, which alone are considered strictly navigable at common law, and to exclude the owners of the banks and beds from all property in them. *Brown v. Chadbourne*, 31 Maine, 9.

The rule of the common law, that riparian proprietors own to the thread of fresh water rivers, has been adopted in Maine. *Ib.*

If a fresh water stream is inherently and in its nature capable of being used for the purposes of commerce or for the floating of vessels, boats, rafts, or logs, it may be so used by the public, leaving to the owners of the beds all other modes of use not inconsistent with this easement. And the stream need not be capable of such use during the whole year. So that such a stream, not containing sufficient water in its ordinary state, for the floating of logs, may yet be used by the public for that purpose whenever its condition admits, and the single fact that it is necessary to go upon the banks under some circumstances, to drive the logs, will not take away the easement, although when a river cannot be used at all without towing or going upon its banks to propel what is floating, this would evince its incapacity for public use. Temporary obstructions may exist, or occasions may arise which would require going upon the banks without taking away its public character; and permanent obstructions also may exist, which may prevent one portion of the river from being public without affecting other parts, free from such obstructions. Where such a river was obstructed by a dam, and an accumulation of logs behind it, belonging to the riparian proprietor, who refused to remove these obstructions to permit the passage of logs belonging to another person, and such person thereupon boomed the logs, opened and repaired some old sluice-ways around the dam belonging to the proprietor, and drove his own logs through them; it was held that this mode of effecting the passage, being in fact least detrimental to the proprietor, the other party was justified in adopting it, and might recover, as part of his damages, the expense of booming the logs and repairing the sluices. *Ib.*

(a) Chancellor Kent gives the following account of the fluctuating doctrines upon the subject in New York. (3 Kent, 427, n.) In the case of the *Canal Appraisers v. The People*, 17 Wend. 571, the judgment of the Supreme Court in 13 Wend. 355, was reversed, and the right of the State over waters above the flow of the sea, for all public purposes, in derogation of individual rights, declared. Thus, though the erection of a dam across the Hudson at the sloop lock between Troy and Lansingburgh, destroyed the value of a waterfall, in the middle sprout of the Mohawk, a tributary stream, the owner of the mill-site was held not entitled to compensation, under the canal law. (*Zimmerman v. Union, &c.*, 1 Watts & Ser. 346, S. P.) But the Court of Errors have since decided (*Commissioners, &c. v. Kempshall*, 26 Wend. 404) that fresh water rivers belong to the riparian proprietors, subject only, if navigable, to the *servitude* of public navigation; and that, in case of any interruption to their use of the water, by reason of improvements made by the State, such proprietors are entitled to compensation.

In the same State, the government may authorize the erection of a bridge across a navigable river, below where the coasting trade is carried on by licensed vessels, provided the bridge be built with a draw, to be used without charge. *The People v. S. & R. Railroad*, 15 Wend. 113. Ejectment lies for land which was below high-water mark in navigable waters and arms of the sea, if it has been filled up and made hard land. *The People v. Mauran*, 5 Denio, 389.

In a recent case, it is held, it seems, that courts are bound to take judicial notice of what streams are, and what are not, highways, at common law. *Browne v. Scofield*, 8 Barb. 239. So, that in New York, and in all the States of the Union, rivers, wherever they are of sufficient capacity to float the products of the mines, the forests, or the tillage of the country through which they flow, to market, have always been adjudged by the courts to be subject to the right of passage, independent of legislation; that the common law, upon this subject, from its want of fitness and adaptation to the condition of things here, has never been adopted; or, if adopted, it has been in a form modified and improved, to fit the condition of the country, and the wants of its inhabitants. Per Johnson, J., *Ib.*

In Pennsylvania, it has been held, that where a statute allowed owners on navigable streams to erect dams, not obstructing navigation or the passage of fish; the privilege might be revoked. *Monongahela, &c. v. Coons*, 6 Watts & S. 101.

River, above tide water, and in Connecticut, to the Connecticut River, notwithstanding their actual navigability.(1)(a)

30. The centre or thread of a stream, to which an adjoining owner has a title, is said to be either the centre, in respect to *the whole quantity of water*, or to the whole width of the stream.(2)

31. The rule in regard to the ownership of islands has been recognized in New Hampshire and Massachusetts. In bounding a conveyance by a river, the stream, as a monument, is described as *the whole stream*, and not a part of it. Islands, too, are so different in size; and in some streams so changeable and difficult to fix are their boundaries and location, in consequence of high floods and long droughts, that any attempt to except them from the general principle would be impracticable.(3)

32. A principle has been adopted in Connecticut, that where a navigable river has gradually shifted its whole bed, so that a man's land has risen on the opposite side, he is entitled to it. Connecticut river is constantly varying its channel; and instances have occurred within the memory of man, where the soil has reappeared within the original bounds of a proprietor, on the opposite bank of the river. Where the fact could be proved, such proprietors have recovered the land. It is said, this doctrine has never been recognized elsewhere, and is clearly inconsistent with the absolute right, by *alluvion*, at common law.(4)

33. In New York and New Hampshire, navigable lakes, and in Maine, large ponds, are placed on the same footing as navigable rivers. The riparian proprietor has no title beyond the shore without a specific grant; and the bed of the lakes can be granted only to such proprietor.(5)(b)

34. The owner of a river, not navigable, has the same exclusive title to it which attaches to any other subject of ownership; and the State cannot constitutionally divert the water for public uses without providing a compensation.(6) (See ch. 70.)

35. The rights of a riparian proprietor do not attach to a mere intruder on land, but he is limited to *his actual possession*.(7)

(1) *Palmer v. Mulligan*, 3 Caines, 319; *son*, 1 Fairf. 238; *The State v. Gilmanton*, 9 Adams v. Pease, 2 Conn. 481. N. H. 461.

(2) *Claremont v. Carlton*, 2 N. H. 371.

(3) *Ingraham v. Wilkinson*, 4 Pick. 268; (6) 3 Kent, 429, n.
Claremont v. Carlton, 2 N. H. 371; *Handly* (7) Co. Lit. 4; 2 Brownl. 142; *Bullen v. Runnels*, 2 N. H. 255; *Rogers v. Jones*, 1 Wend. 255, 256; *Claremont v. Carlton*, 2 N. H. 371; *Varick v. Smith*, 5 Paige, 141.

(4) 1 Swift, 111, 112.

(5) 1 N. Y. Rev. St. 208; *Hathorn v. Stin-*

(a) It has been held, that owners of land on the banks of the *Harlem River* have no peculiar rights in the waters of that river. The corporation of New York own between high and low-water marks; and the legislature has control of the rest. *Water Commissioners*, 3 Edw. 290.

(b) Chancellor Kent remarks, that our great navigable lakes are properly regarded as *public property*, like the sea. 3 Kent, 430, n. In Vermont, an owner of the shore of Lake Champlain, may extend his wharf or store-house any distance into the lake, not obstructing ordinary navigation. So the title of those who have previously done so is established by the Revised Statutes. Rev. St. 310.

CHAPTR LXIX.

WATER-COURSES, MILLS, DAMS, ETC.

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| 1. Water-course—nature of the property therein.
8. General principle, as to the use of running water—distinction between riparian proprietor and mill owner.
13. Cases where the public is interested.
15. <i>Detention</i> of the water. | 17. Right to erect a dam—amount of injury, &c.
20. Measure of one's water power—what.
22. Water cannot be <i>corrupted</i> .
23. <i>Opposite</i> owners.
24. Adverse and prescriptive right.
31. Right gained by <i>prior occupancy</i> .
38. Right of irrigation, &c. |
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1. HAVING, in the last chapter, considered the subject of the ownership of rivers, not navigable, *in the abstract*, we proceed to the important practical rights, which grow out of this ownership, pertaining to the use of the water of such rivers, by the respective proprietors of the banks.

2. A water-course is regarded in law as a part of the land over which it flows, and will therefore pass with the latter by a deed or patent, unless expressly reserved.(1)

3. Upon this principle, the right to a water-course is a freehold interest, of which the owner cannot be deprived, but by lawful judgment of his peers, or due process of law.(2) (See ch. 70.)

4. A water-course cannot be recovered in an action, either by the general description of a *stream* or *river*, or by its cubical or superficial measure, but only as *so much land covered by water*.(3) (See ch. 1.)

5. Ejectment will lie, however, for a *boilary* of salt; meaning the water which arises in a salt well, belonging to one who has no right in the soil. So, also, for a *pool*. In both cases, the water is *fixed*, not running, and the word *pool* embraces the land also.(4)

6. The privilege of drawing water from a pond is not *land*. Hence, a covenant relating to it is not a covenant *running with the land*, and is not assignable.(5)

7. A *mill-site* can pass by a deed only as incident to a mill, where no land is granted as such. Hence, upon abandonment of the mill, the title to the site fails.(6)(a)

8. Every proprietor(b) of land, on the bank of a fresh water river, has

(1) *Watkins v. Holman*, 16 Pet. 25.

(2) Co. Lit. 161; *Gardner v. Newburgh*, 2 John. Cha. 162.

(3) 2 Bl. Com. 18; *Challenor v. Thomas*, Yelv. 143.

(4) *Comyn v. Kyneto*, Cro. Jac. 150; 1 Lev. 44; Co. Lit. 5.

(5) *Wheelock v. Thayer*, 16 Pick. 68.

(6) *Miller v. Miller*, 15 Pick. 57.

(a) Water power for mill purposes, not used, being merely a *capacity* of land for a certain mode of improvement, is not *taxable*, independently of the land. *Boston, &c. v. Newton*, 22 Pick. 22. Two towns, A and B, being divided by the thread of a river, a dam was made across it, and the power thus created was applied wholly to mills in A. Held, the power was not taxable in B. *Ib.*

(b) In case for diverting a water-course from the lands of the plaintiff, his *possession* is sufficiently stated in the declaration by an averment, that, at the time of the commission of the torts, he was "seized in his demesne as of fee;" for seizin in law is sufficient. *Hart v. Evans*, 8 Barr, 13.

The gist of the action is the diversion, which, in whatever way it is done, is an injury both to the freehold and the possession. *Ib.*

a right to the use of the water, *as it was wont to run, (ut currere solebat,)* without diminution or alteration; and no owner has, in general, a right to use it, to the prejudice of other owners above or below him, by throwing it back upon the former, or subtracting it from the latter. (a) A water-course begins *ex jure nature*, (b) and, having taken a course

The water-course is a permanent advantage to the inheritance, and taking it away an injury to the inheritance, for which an action lies. *Ib.*

The measure of damages, is the injury sustained by the wrongful acts of the defendants upon the premises. *Ib.*

In an action on the case for diverting water from the plaintiff's mill, it is not sufficient for the defendant to show an outstanding right in some third person, to take the water for the use of the premises occupied by the defendant, paramount to the plaintiff's right to the water, without showing title from such third person to himself. *Rogers v. Bancroft*, 20 Verm. 250.

(a) Where a spring is supplied by a subterraneous stream, an owner of the land above the spring cannot divert the stream to the injury of those who use the water from the spring. *Smith v. Adams*, 6 Paige, 435. But the owner of land may dig a well on any part of it, though he thereby diminishes the water in his neighbor's well, unless the latter has gained an adverse right by grant or prescription, or unless the act is done merely with a malicious intent, thus to injure the latter. *Greenleaf v. Francis*, 18 Pick. 117. (See sec. 24, n.)

The general rule stated in the text, expressed by the maxim, "*sic utere tibi, ut non alienum ledas*," is applicable to government and its grantees. *Hendricks v. Johnson*, 6 Por. 472.

Upon the same principle, that every owner of a stream is entitled to the benefits of the natural flow of the water, a mill owner has a privilege in the land below for the purposes of such passage, and a right to keep it clear. *Prescott v. Williams*, 5 Met. 429. And this privilege is technically an *easement*. *Cary v. Daniels*, *Ib.* 236. So, where the owner of a salt meadow upon a navigable stream, above a dam, sues the mill owner for obstructing the water and thus injuring the grass; this is an action concerning an *easement*. *Turner v. Blodgett*, *Ib.* 240, n.

Declaration, that the plaintiff was seized and possessed of a mill, mill-dam, and water privilege on F. Brook, and had a right to the use of the water for the raising of a head of water, and for the driving of his said mill, without molestation. and that the defendant erected, over and across said brook and another brook leading into the same above the plaintiff's mill, a dam, in such an insecure manner, that, after raising a great body of water in said stream, above the plaintiff's mill, the defendant's dam was carried away by reason of this improper and insecure construction; by means whereof, a large and unusual quantity of water was let down upon the plaintiff's dam and mill, whereby the same were greatly damaged, and a large quantity of sand was washed and thrown into the pond of the plaintiff, by which the same was much diminished in capacity for containing water, and his mill privilege thereby greatly reduced in value, and he was put to the expense of \$200 for the repairs of the same, and was subjected to great loss by the interruption of the business of his mill. Held, after verdict, it sufficiently appeared, that this was an action respecting an *easement*, within St. 1840, ch. 87. *Soule v. Russell*, 13 Met. 436.

(b) Hence, the principle does not apply to *artificial* streams. Thus, if water raised by a steam-engine from a mine, or flowing from the eaves of houses, is thrown upon adjoining land and used by the owner, such use will give no claim to have the privilege continued. *Arkwright v. Gell*, Gale & W. 182; 5 Mees. & W. 203.

But a person may make a new water-course upon his own land, and withhold its use from all those who will not make compensation, and authorize and contract for its use by those who will. [Wells, J., dissenting.] *Dwinel v. Barnard*, 28 Maine, 554.

After an artificial vent has been substituted for the natural channel of a water-course, it is the duty of the party who has obstructed the natural channel to keep the artificial vent in repair. *Brisbane v. O'Neill*, 3 Strobbh. 348.

Although, if a person should obstruct the flow of a stream over its accustomed bed, so that it could not be used as formerly, for the purposes of boating or floating rafts or logs, and should turn it into a new channel; he would thereby authorize the public to make use of it in the new, as they had used it in the old channel; yet, if a person without right should open a sluice or channel on his own land, and thereby divert the waters of a stream, river, or lake from their natural and accustomed course, without causing any obstruction elsewhere; the public would not thereby become entitled to their use over his land, though some other person unconnected with him had obstructed the flow and egress of the waters from a distant point of such stream. [Wells, J., dissenting.] *Dwinel v. Barnard*, 28 Maine, 554.

Where land owners have agreed to have a water-course made through their respective lands for the purpose of supplying a town with water; an injunction lies against one of them who diverts the stream into its old channel. *Duke, &c. v. Elgin*, 7 Eng. L. & Eq. 39.

naturally, it cannot be diverted. The natural stream, existing by the bounty of Providence, for the benefit of the land through which it flows, is an incident annexed by operation of law to the land itself.(1) Ownership of the bank gives no title to the water itself, but a simple *usufruct*, or enjoyment, while it passes along; unless by virtue of a grant, or an uninterrupted enjoyment for twenty years, which is evidence of one. The property in a water-course consists not so much in the fluid itself, as in the advantage of its *impetus*.(2)

9. The important distinction between the rights of a riparian proprietor *as such*, and his rights *as a mill owner*, was considered in a late case in Connecticut. In that case, A, a riparian proprietor, had used the water for more than fifteen years(a) for a mill, by conducting it through a raceway into a reservoir, and thence to the mill. B, an owner of the stream above, afterwards obstructed the natural flow of the water, A having a short time before given up his reservoir, in consequence of which he required more water, and but for which he would have suffered no injury. Held, B was liable to an action. Williams, J., remarked, that in regard to a right acquired by continued enjoyment, its extent is measured by the extent of the enjoyment. But the riparian proprietor has, annexed to his lands, the general flow of the stream, so far as it has not been already acquired by some prior and legally operative appropriation. Hence, the plaintiff, in this case, has a right to the flow of the water, not by his artificial channel, or into his reservoir, but within its banks through his lands, as it was wont. His mode of using the water is immaterial, except as affecting the damages.(3)

(1) Tyler v. Wilkinson, 4 Mass. 400-1; Evans v. Meriweather, 3 Scam. 494; Webster v. Fleming, 2 Humph. 518; Acton v. Blundell, 12 Mees. & W. 349; Hall v. Swift, 6 Scott, 167; Embree v. Owen, 4 Eng. L. & Eq. 466; Canal, &c. v. Haven, 5 Gilm. 548; Wood v. Sutcliffe, 8 Eng. L. & Eq. 217.

(2) Wright v. Howard, 1 Sim. & Stu. 190; Mason v. Hill, 3 B. & Ad. 304; 5 Ib. 1; Gardner v. Trustees, &c., 2 John. Cha. 162; Belknap v. Belknap, Ib. 463; Merritt v. Parker, Coxe, 460; Tyler v. Wilkinson, 4 Mas. 397; Coalter v. Hunter, 4 Rand. 58; Hammond v. Fuller, 1 Paige, 197; Hutchinson v. Coleman, 5 Halst. 74; King v. Tiffany, 9 Conn. 162; Blanchard v. Baker, 8 Greenl.

253; Beissell v. Sholl, 4 Dall. 211; Palmer v. Mulligan, 3 Caines, 307; Colburn v. Richards, 13 Mass. 420; Cook v. Hull, 3 Pick. 269; Runnels v. Bullen, 2 N. H. 532; Merritt v. Brinkerhoff, 17 John. 306; Van Bergen v. Van Bergen, 3 John. Cha. 282; Thompson v. Crocker, 9 Pick. 59; Johns v. Stevens, 3 Verm. 308; Howell v. McCoy, 3 Rawle, 256; Shury v. Piggot, 3 Bulst. 339; Cooper v. Williams, 4 Ohio, 286; Williams v. Moreland, 2 Barn. & Cr. 910; 3 Kent, 439; Wadsworth v. Tillotson, 15 Conn. 366; 2 Bland, 125.

(3) Buddington v. Bradley, 10 Conn. 213. See 4 Mas. 403; Bealey v. Shaw, 6 E. 208; Saunders v. Newman, 1 B. & Al. 258; Mason v. Hill, 3 B. & Ad. 404; 5, 1.

(a) The period of prescription in Connecticut. In the same State, the plaintiff, in an action on the case, for the diversion of a water-course, alleged, that the defendant, by means of a dam across the stream above the land of the plaintiff, and a channel connected therewith, diverted the water out of its natural course, away from the land of the plaintiff, and prevented the water of the stream from flowing along, in its usual course, to the land of the plaintiff, and supplying the same with water, as it otherwise would have done; that, by reason thereof, the water of said stream could not, nor did, during the time specified, flow to said land, as it ought to, and otherwise would have done; and that the plaintiff, thereby, for want of such sufficient water, could not, during that time, use his said land in so large and beneficial a manner, as he might and otherwise would have done, but was thereby, during said time, deprived of the use and enjoyment of said land, and all the benefits and advantages which he otherwise might and would have derived from said land. Held: 1. That a sufficient cause of action was shown, although the declaration did not aver the existence of any mill, or other works of the plaintiff, on his land, for the operation of which, the water so diverted was needed. 2. That the statement of damage to the plaintiff was made with sufficient particularity. Parker v. Griswold, 17 Conn. 288.

10. A, an owner above, by a wear or dam, diverted the water. About ten years afterwards, B, the adjoining owner below, made a channel in his own land, contiguous to the stream, for some manufacturing purpose, not previously carried on. In an action by B against A, held, A had acquired no right by his use of the water, against B.(1)

11. The principle of this distinction is equally applicable, where the situation of the parties is reversed; and the action brought by an owner above against one below, for obstructing the natural flow of the water. In such case, it is not a defence, that the interruption would have caused the plaintiff no injury, if he had continued to use the water as he had formerly done. As, for instance, where the plaintiff had lowered his hammer-wheel.(2)

12. Several ancient cases are cited by Mr. Angell with respect to the natural right to a water-course. Thus, in 32 Edw. III, A brought an assize of nuisance against B, for that B had made a trench over a river, and drawn the water from its usual course; and judgment was given for removal of the water into the old channel, at the cost of B. So it was said, many centuries ago, that where A has a mill which grinds ten quarters per day, and B, an adjoining owner, diverts the water so that it will grind but one quarter, A has a right of action against B. According to other old authorities, the owner of an ancient mill, which has existed time out of mind, has no remedy against one who erects another mill upon the same stream, unless the flow of water to the former is thereby stopped, or the water rendered so abundant as to hinder its working. So an action lies against one who puts stake-nets into a stream, whereby the water is prevented from flowing to a mill, and its profits diminished.(3)

13. An action lies, it seems, for diverting water from a mill, though it stands within the limits of tide waters, and is, therefore, a nuisance.(4) So, a suit lies, where a mill is injured by obstructing the stream, though the mill-dam is a public nuisance.(5) So, the owners of a mill have not the right, though necessary for the purpose of repairs, to divert the stream to the injury of a proprietor below. They must obtain his consent, or answer to him in damages.(6)

14. Where a dam is erected upon a stream for the purpose of feeding a public canal, an owner upon the stream below is entitled to the natural flow of the surplus waters, passing over the dam, for mill purposes, and may maintain an action against a lessee of such surplus waters, who diverts them.(7)

15. The law forbids not only the permanent diversion or diminution of the water, but also its *unreasonable detention*. Thus, a mill owner above has no right to keep the water an unreasonable time, by shutting down his gate.(8)

16. The *interruption* of water is regarded in law as substantially the same injury with its *diversion*. Hence, when a declaration avers, that

(1) *Mason v. Hill*, 3 Barn. & Adol. 304; (*Wright v. Howard*, 1 Sim. & Stu. 190.)

(2) *King v. Tiffany*, 9 Conn. 162.

(3) Ang. on W. C. 10; Callis on Sewers, 263; Woolrych, 209; 2 Hen. IV, 11 B; Ro. Abr. 107; 22 Hen. VI, 14; 9 E. 4, 35.

(4) *Simpson v. Seavey*, 8 Greenl. 138; *Palmer v. Mulligan*, 3 Caines, 307; *Varick v.*

Smith, 5 Paige, 148. See *Harris v. Thompson*, 9 Barb. 350.

(5) *Haller v. Pine*, 8 Blackf. 175.

(6) *Van Hoesen v. Coventry*, 10 Barb. 518.

(7) *Varick v. Smith*, 5 Paige, 137. See *Walrath v. Barton*, 11 Barb. 382.

(8) *Angell*, 15; *Merritt v. Brinkerhoff*, 17 John. 306; *Williams v. Morland*, 2 B. & C. 910.

by means of the erection of a dam by the defendant, an owner above, the water is *diverted* from the mill of the plaintiff below, and also that the water does not run to such mill, as it was wont to do; and the only injury proved is an interruption of the *regular supply* of water; the variance is held merely technical, and the plaintiff shall prevail.(1)

17. As a water-course cannot be applied to its most valuable uses without the aid of a *dam*, every owner has a right to erect such dam;(a) and neither the loss of water by evaporation from a pond thereby raised, nor the occasional increase or diminution of the quantity of water, or the acceleration or retardation of the current below, constitutes any legal ground of action against him.(b) The question turns upon the nature and extent of the injury.(c) And one which is merely *theoretical*, the law will not notice.(2)

(1) *Shears v. Wood*, 7 Moore, 345; 17 S. Thompson v. Crocker, 9 Pick. 59. See *Smith & Low*. 76. v. Adams, 6 Paige, 435; *Wadsworth v. Tilton*, 15 Conn. 366.

(2) *Tyler v. Wilkinson*, 4 Mas. 401; *Angell*, 16; *Palmer v. Mulligan*, 3 Caines, 307; {

(a) As a necessary means for securing a constant supply of water, especially upon small streams, which are frequently dry, a mill-owner is allowed to create a *reservoir* above his mill. But this must be done with as little inconvenience as possible to other owners. *Angell*, 20; *Wolcott, &c. v. Upham*, 5 Pick. 292.

A, the owner of land and mills on a stream above the land and more ancient mill of B, on the same stream, raised his dam, and kept back the water only as long as was necessary to fill his mill-pond, whereby B's mill was temporarily stopped. Held, this was not an unreasonable use of the stream by A, and B had no cause of action against him. *Pitts v. Lancaster Mills*, 13 Met. 156.

The degree of care which a party who constructs a dam across a stream is bound to use, is in proportion to the extent of the injury which will be likely to result to third persons provided it should prove insufficient. Per *Walworth, Chancellor*. *Mayor, &c. v. Bailey*, 2 Denio, 433.

It is not enough that the dam is sufficient to resist ordinary floods. Great freshets must be guarded against, if the stream is occasionally subject to them. *Ib*.

Such prudence is required, as a discreet person would use, if the whole risk was his own. *Ib*.

A declaration in case, for raising a mill-dam, so as to violate the condition upon which the privilege to erect it was granted, to the injury of the plaintiff, is good. *Hardy v. McNeil*, 8 B. Mon. 449.

In a suit to recover damages for erecting a dam on a stream, to such a height as to throw the water back upon the plaintiff's dam and mill, and render them of no value; a plea, setting forth a grant to the defendant of a privilege to build a mill upon the stream, previous to the plaintiff's obtaining his grant, or obtaining title to his land, is not sufficient, unless it shows that the grant to the defendant was unrestricted as to the height of the dam, or that, if restricted, the restriction was not exceeded. *Ib*.

A right to flow land, by means of a pond created by a dam attached to an ancient mill site, is a prescriptive right in a *que* estate. *Sargent v. Guttererson*, 13 N. H. 467.

If issue be taken upon the charge of flooding the plaintiff's land, "by means of a dam erected across a stream of water," the proof must be confined to this point; and evidence that the water was raised by obstructing two outlets or lateral sluices, through a bank of the stream which was no part of the dam, is not admissible. *Good v. Mylin*, 8 Barr, 51.

Where a dam was erected by the defendant himself, a request to remove the obstruction is not necessary to an action. *Branch v. Doane*, 17 Conn. 402.

(b) As in other cases of *nuisance*, the injured party may abate it by his act, instead of bringing a suit. But if a dam so flows the water back upon a dam above it, as to justify a party in abating it by his own acts, as a nuisance, he must confine his operations to the dam itself, and to such portions of it only as caused the injury, and, by being abated, would remove it. *Moffett v. Brewer*, 1 Iowa, 348.

(c) Judge Story says, (4 Mas. 401,) "There must be allowed of that which is common to all a reasonable use." "The diminution, &c., not sensibly injurious, is an implied element in the right of using the stream at all. The law acts with a reasonable reference to the public convenience and general good." *Woodworth, J.*, says, (17 John. 321,) "If the injury is trivial, the law will not afford redress." An upper mill owner cannot render mills below useless and unproductive, but the owners of the latter are entitled to "a fair proportion," not-

18. Thus, where the declaration alleged, that, by means of the erection of a dam above, the water was diverted into a new channel, and made to flow with violence, instead of flowing smoothly as before, to the injury of the plaintiff's banks and premises; and the jury found there was no injury done, adding, that the defendant had no right to stop the stream in summer; a verdict was ordered for the defendant.(1)

19. But it has been held in Maine, that if water is *wrongfully* diverted from the plaintiff's mill, nominal damages may be recovered, though no actual injury to the mill is proved. An unoccupied mill power has a value which is under the protection of the law. It may have been created for *future* use, or it may be sold to others. Its abstraction, therefore, must necessarily be a damage to the owner. The same doctrine is now adopted in Connecticut, Massachusetts and Illinois.(2)(a)

(1) Williams v. Morland, 2 B. & Cress. 910.

(2) Butman v. Hussey, 3 Fairf. 407; Blanchard v. Baker, 8 Greenl. 268. See Hobson

v. Todd, 4 T. R. 71; Bolivar, &c. v. Nepon-

set, &c., 16 Pick. 247; Plumleigh v. Dawson, 1 Gilm. 544.

withstanding a *partial loss* is thereby occasioned to the owner above, who requires all the water, in order to derive the greatest profits. If the latter makes an *unrestricted* use of the water, and this proves *destructive* to the mills below, the law will give damages. It is held, in Ohio, that no action lies for flowing back the water upon an owner above, unless some injury is done. Cooper v. Hall, 5 Ohio, 322. In Maryland, the law is said to allow a fair competition among mill owners. Binney, 2 Bland, 114. See Embrey v. Owen, 4 Eng. L. & Equ. 466; Parker v. Griswold, 17 Conn. 288.

Where the plaintiff and defendants were riparian proprietors, and the defendants erected a mill-dam at a place where they owned the land on both sides of the stream, and thereby caused the water to flow back in the channel of the stream ten or eleven inches, whereby a valuable mill-shoal of the plaintiff was drowned to that extent; it was held, that the plaintiff was entitled to maintain an action, and could recover nominal damages, even though no perceptible damage could be shown; also, to show to what extent he had been actually injured, in consequence of the back-water, although the same was not thrown out of the natural bed of the stream. Hendrick v. Cook, 4 Geo. 241.

But in an action for diverting a stream which ran through the plaintiff's land, the defendant may show, in mitigation, that the diversion was made on his own land; that it was a benefit rather than an injury to the plaintiff; and that it was done under a license from the plaintiff. Addison v. Hack, 2 Gill, 221.

(a) The same doctrine has been held by Judge Story in a recent case. He decided, that actual perceptible damage is not necessary to sustain an action, but only a violation of the plaintiff's right. In such case, the law presumes some damage. *A fortiori*, where the act done is such, that, by its repetition or continuance, it may become the foundation or evidence of an adverse right. Hence, an action lies for diverting a water-course, without actual damages. *A fortiori*, a bill in equity for an injunction, because it is the peculiar province of Chancery to interpose, where either no remedy or an inadequate one exists at law. But such bill would not lie, where there is a mere fugitive and temporary diversion, without damage or pretence of right. Webb v. Portland Manufacturing Co., C. C. U. S., May, 1838, Maine Law Reporter, February, 1841, p. 372; 3 Sumn. 189. See 2 Ld. Raym. 938; 2 Lev. 50, 250; Cro. Jac. 478; 1 Saun. 346 a, n. 2; 2 Bl. R. 1239; 2 Wils. 414; 1 Barn. & Ad. 415; 4 T. R. 71; 2 E. 162; 1 Bing. N. R. 549; Stout v. M'Adams, 2 Seam. 69; 2 B. & C. 910; 1 M. & S. 235; 10 B. & C. 145; Spooner v. McConnell, 1 McLean, 338. A bill in equity does not lie, to settle the legal title to a water-course, nor to enjoin the use. See Binney, 2 Bland, 117. So where there was a fall, allowing but one dam, and two owners built mills at the same time, the lower of which rendered the upper one useless; held, equity would not interfere by injunction, but the rights of the parties must be settled at law. Porter v. Witham, 5 Shepl. 292. So equity will not interfere, to settle the respective rights of parties in the use of water, and the quantity the plaintiff is entitled to use in propelling certain machinery; to restrain the defendant, by injunction, from drawing the water from a dike, so as to deprive the plaintiff of a sufficient quantity for such purpose; and to protect him in the undisturbed use of the water; where the defendant does not dispute or contest the plaintiff's rights, after the quantity of water he is entitled to shall be ascertained; but the plaintiff's rights have not been established at law. Olmstead v. Loomis, 6 Barb. 152.

20. It is said, that the water power, belonging to a riparian owner, is the difference of level between the surface where the stream in its natural state first touches his land, and the surface where it leaves it. He cannot, by digging on his land, lower the water of a pool above, nor deepen the channel below, and thus lower the water as it leaves his land.(1)

21. It is stated to be the law of Scotland, on this subject, that a proprietor above cannot alter the level of the water, either where it enters, or where it leaves his property.(2)

22. The owner of land through which a stream passes has no right to make such use of it as to send it down to an owner below, poisoned or corrupted. Thus, the water may be used in connection with a tannery or bark-mill, if so much only be taken away as is necessary for this purpose; but the residue cannot legally be soiled by admixture with foreign substances, to the injury of another proprietor. So an action lies against a glover, who sets up a lime-pit so near the water as to corrupt it.(3)

23. The general principles above stated apply not only to upper and lower owners upon one stream, but to those who own on opposite sides. Each is entitled to the natural use of *the whole* water, and, therefore, has a remedy against the other for any diversion or diminution of it.(4)(a)

(1) *McCalmont v. Whitaker*, 3 Rawle, 84; 1 Gilm. 544.

(2) *Bell's L. of Scot.* 691.

(3) *Bealey v. Shaw*, 6 El. 208; *Howell v. McCoy*, 3 Rawle, 256; 9 Co. 57 b. *Aldred's case*; *Magor v. Chadwick*, 11 Ad. & El. 571.

(4) *Curtis v. Jackson*, 13 Mass. 507; *Wetmore v. White*, 2 Caines' Cas. in Er. 87; *Arthur v. Case*, 1 Paige, 448. (And see *Boyn-ton v. Rees*, 9 P. 528; *Vandenburgh v. Van Bergen*, 13 John. 212.)

A granted to B the right of taking from his canal 12 inches square of water. B soon after erected a mill, and used the water, but there was no means of accurately measuring the quantity. A, in 1827, gave B notice, that he had reason to believe he was taking more than his quantity, and requested him to confine his future use to that quantity. A similar notice was given in 1843. In 1844, A built a stone wall in his canal, opposite the head race leading the water to B's mill, and placed an aperture therein to measure the water; and B threw down the wall. Held, on a bill in equity by A against B, A was not entitled to a preliminary injunction, before the rights of the parties were determined, restraining B from taking more than his quantity of water, and from pulling down any guage which A might put in to measure the same. *Society, &c. v. Holsman*, 1 Halst. Ch. 126. See also *Morris, &c. v. Society, &c.*, 1 Halst. Ch. 203.

Acquiescence in a nuisance by the party injured, is a bar to a bill to restrain the nuisance. *Sprague v. Steere*, 1 Rhode Island, 247.

Where the plaintiff, having granted a mill site and water privilege, with power to flow his land within certain limits, permitted a dam to be raised so high as to flow the water beyond those limits, and, afterwards allowed the dam to be repaired, at the same height, and a mill and machinery to be adjusted to that height; the court refused an injunction to compel the defendant to lower his dam, and restrict the flowage to the limits expressed in the grant. *Id.*

(a) It is said, one of two opposite owners cannot claim the right of diverting the water, upon the ground that he takes only that part of it which flows upon his own side; for this is physically impossible. 8 Greenl. 270.

So, it is held, that a riparian owner can only claim one-half of the bed of the stream, and of the water naturally flowing along the channel. He is bound to use it as an entire stream, in its natural channel, for a severance would destroy the rights of all. *Canal, &c. v. Havens*, 11 Ill. 554.

So, the owner of one bank of a river not navigable has a right to erect a dam across such river, but not in such a manner, or so high, as to injure the owner on the opposite bank, or other tenants in common of the stream. *Moffett v. Brewer*, 1 Greene, 348.

A dam erected across a river not navigable, by the owner of one bank, in such a manner as to injure other owners of the banks, and tenants in common of the stream; is a private, not a public, nuisance, and, if abated by the act of the parties injured, must be abated within a reasonable time. *Id.*

But if one of them run a dam beyond the thread of a river, he is a trespasser by reason of that portion of it which stands upon the side opposite to his own; and if the other owner, in removing this part of the dam, throw down the whole, and thereby divert the water, it is no injury to the party who erected it.(1)

24. The right of using running water is an *easement*, and, like other easements, may be acquired as an adverse and exclusive privilege, varying from the natural and original title, by *prescription*, or an enjoyment for a long period of time.(a) The time necessary to constitute a pre-

(1) *Wigford v. Gill*, Cro. Eliz. 269.

The plaintiff owned land, bordered on one side by a natural stream. The defendant owned land below, with a mill, on the opposite side. Under an authority obtained from the proprietors on both sides above the plaintiff's land, the defendant erected a dam there, and cut a channel therefrom to the mill upon his land, through which a portion of the water was diverted from the stream, producing a natural diminution thereof, and was not returned to it until after it had passed the plaintiff's land. Held, 1. The defendant could not justify such diversion, either by virtue of the authority derived from the proprietors above, or by virtue of his general rights as riparian proprietor below; 2. That the plaintiff was not precluded from an action for such diversion, because he owned the land only on one side of the stream and to its centre. *Parker v. Griswold*, 17 Conn. 288.

Plaintiff and defendant owned different mills on one dam. The plaintiff brings an action against the defendant for opening a canal into the pond above, for a supply of water to work his mill. The water thus withdrawn was returned to the stream immediately below the dam, and was less in quantity than the defendant would have used at his mill on the dam. By means of a reservoir higher up, the defendant also increased the quantity of water in the stream. Held, both parties were entitled, *per my et per tout*, to their share of the whole stream on its arrival at the dam, and, therefore, notwithstanding the above defences, the action was sustained. *Webb v. Portland Manufacturing Co.*, U. S. C. C. May 1838; *Maine, Law Reporter*, Feb. 1841, p. 374; 3 Sumn. 169.

(a) In a late English case, a distinction has been made between the title gained by prior use to streams above ground, and that acquired in the same way to *subterraneous streams*. (See sec. 8, n. a.) The use of the latter, unlike that of the former, is said to be *secret*. In case of a stream above ground each owner gives to the proprietor below what he takes from the one above, which is not the case of subterraneous streams. An exclusive title to the latter might prevent another owner from draining his lands. So the employment of a spring for some trifling use, might prevent the working, for instance, of a valuable mine. The exclusive privilege, also, would extend to an unreasonable distance. For these reasons, stated at length by Tindal, Ch. J., in an able and elaborate opinion, citing numerous authorities from the common and civil law, the court establish the principle, that adverse or prior enjoyment does not give title to the exclusive use of subterraneous water. Whether twenty years' use would not, is left as a doubtful point. *Acton v. Blundell*, 12 Mees. & W. 324.

A bill in equity lies for the diversion of water from a spring and water-course, by digging a deep well and fountain. *Dexter v. Providence, &c.*, 1 Story R. 387.

Upon the same subject, it is further remarked, that the right to have a stream which flows above ground run in its natural course, is not by a presumed grant from long acquiescence on the part of the riparian proprietors, above and below, but is *ex jure nature*, and an incident of property; and an action lies for infringement of this right. *Dickinson v. The Grand, &c.*, 9 Eng. Law & Eq. Rep. 513.

Aliter in the case of underground water; unless its course is well known. *Ib.*

Where water is taken from a river, after forming part of it, by the digging of a well; an action at common law will lie by a riparian proprietor against the digger, for the abstraction of water which never formed part of the river, but has been prevented from doing so in its natural course by the excavation; whether the water was part of an underground water-course, or percolated through the strata. *Ib.*

Such action lies, on an agreement not to diminish the supply of water of the river, or on the provisions of a special statute to that effect. So for any injury to the right, though there be no actual loss. *Ib.*

A had on his land a reservoir, made by excavating the ground a few feet below the surface, into which the water came, by percolation through the earth, and stood, in sufficient quantity for the use of his cattle; but never rose to a level with the adjoining land. At a short distance from this reservoir, he made another excavation, calling it a well, in which the water stood somewhat higher than in the former, but still never overflowed. By means of a syphon, he then brought the water from the well into a cistern, from which he used and

scription will be stated hereafter. (See *Prescription*.) Thus, the owners of artificial works may acquire rights by actual appropriation, as against the riparian proprietor,^(a) and the extent of the right is to be measured by the extent of the appropriation. The mode of using the water cannot be materially varied to the prejudice of other owners; but the proprietor is not bound to use the water in the same precise manner, or to apply it to the same mill; for such a restriction would stop all improvements in machinery.^(b) He may by his erections and dams increase his

distributed it, to his profit. B afterwards made an excavation on his ground, in which water stood; the consequence of which was, that the water in A's well did not rise high enough to pass therefrom into his cistern; but how this effect was produced, did not appear. The acts of B were done for his own advantage, without any design unnecessarily to injure A. On a bill in Chancery, brought by A against B, to restrain B in thus using the water; held, A, by his prior use of water, under ground, acquired no exclusive right therein, as found, in or on B's land; the law of surface streams not being applicable to such water. *Roath v. Driscoll*, 20 Conn. 533.

The adverse or exclusive use of water, flowing through an aqueduct, by the owners and occupants of a house, for twenty years, furnishes presumptive evidence of a grant, from the owner of the land through which it is brought. *Watkins v. Peek*, 13 N. H. 360.

The water of a spring had been carried, by an aqueduct, through the land of A to the house of B, for twenty years and more, under such circumstances as to raise a presumption of a grant to B, or those whose estate he had. Within twenty years, B permitted C and D to convey a portion of the water to their houses. Held, that, although C and D had not had the use of the water long enough to raise a presumption of a grant from A, or those under whom he held; yet their rights to it were derived from B, and A, therefore, could not lawfully deprive them of it. *Ib.*

Repairs made upon an aqueduct, which is laid through the land of another, cannot be regarded as in the nature of rent, or as an acknowledgment that the easement is held at the pleasure of the owner of the land, without other evidence tending to show an agreement to that effect; nor will the fact that the owner of that land takes a part of the water from the aqueduct be so regarded. But it may be evidence, that the party repairing takes the water, and the right to enter and repair, upon the condition of furnishing the owner of the land with a portion of the water; and the performance of the condition may be essential to the continuance of the right. *Ib.*

(a) So, as against an *opposite owner*. Thus, where the main body of the water in a river has been turned by a dam for the use of a mill, and the existence of such dam is not restricted as to time, and the dam and mill are maintained for forty years without objection; a perpetual right to continue such use of the water is acquired, and, in an assessment of damages for diverting the course of the river, the owner of the land opposite such mill ought not to be compensated for one-half of the natural flow of the river. *Matter of Water Commissioners*, 4 Edw. Ch. 545.

(b) But where a new and different machine is erected in an ancient mill, as, for instance, a *lath-mill* in an ancient *saw-mill*, the prescriptive privilege of the mill does not extend to this machine. *Simpson v. Seavey*, 8 Greenl. 138. Several owners upon one fall apportioned the water, assigning a part to A, owner of a fulling-mill, for the use thereof, or for other machinery requiring equal power. Held, the right was not inseparably annexed to the building or site at which the water was then used, but might be exercised at any convenient site requiring an equal quantity, and involving no more injury to others. *Hurd v. Curtis*, 7 Met. 94.

To establish a prescriptive right of flowing water by a dam for the use of a mill, it is not necessary that the dam should have been maintained for the whole period upon the same spot; it is sufficient, if shown to have been upon the same mill site, though removed, from time to time, to different places upon such site. *Stackpole v. Curtis*, 32 Maine, 383.

So, a *grant or reservation* of a water privilege will not ordinarily be restricted to the particular use named, unless the deed seems very clearly to indicate such an intent, and the use has been uniformly consistent with such a construction; but the use is to be regarded as a measure of the quantity to be used. *Adams v. Warner*, 23 Verm. 395.

Thus, in a grant of water power, the grantor reserved sufficient water to carry a forge and two blacksmith's bellows. Held, the grantor, and those claiming under him, had a right to apply the reserved water to the propelling of a paper mill; provided a greater quantity was not used, than would be requisite for the objects specified. *Olmste d. v. Loomis*, 6 Barb. 152.

Where a person grants land with a water privilege, reserving water sufficient to propel certain machinery; he is entitled to use the water for other purposes; the manner of using the water being specified, rather for the purpose of showing the quantity reserved, than restricting the manner of its use. *Cromwell v. Selden*, 3 Comst. 253.

quantity of water, or the rapidity of the current below, not injuring the land or works below.(1)

25. If a prior occupant materially changes his mode of using the water, before which change another owner has improved the stream, the latter may maintain an action against the former for any injury caused by such alteration. But if an owner above obstruct the stream in its accustomed course, to the injury of an owner below; the latter may recover damages, though the injury is caused by his needing additional water, in consequence of erecting additional works.(2)

26. It is said, a title by prescription justifies even such a use of the water as deteriorates it in quality—as by the exercise of certain trades.(3)

27. But a prescriptive right can be exercised only in a reasonable manner. Hence, if the party thus entitled use the water, not for his own benefit or convenience, but maliciously or wantonly, to the injury of another, he is liable to an action.(4)

28. The plaintiffs, for more than twenty years, by means of a canal, adversely diverted and used the water of a stream, subject to a reservation in favor of the owners of the meadow, through which the canal was cut, of a right to turn the water down the natural channel, for six weeks in each year, for the purpose of getting hay more conveniently, and digging clay. Held, this reservation merely limited the plaintiffs'

- (1) *Van Bergen v. Van Bergen*, 3 John. Cha. 282; *Sherwood v. Burr*, 4 Day, 244; *Yard v. Ford*, 2 Saun. 175 a; *Brown v. Best*, 1 Wils. 174; *Bealey v. Shaw*, 6 E. 208; *Balston v. Bensted*, 1 Camp. 463; *Saunders v. Newman*, 1 B. & Ald. 258; *Baker v. Richardson*, 4 Ib. 578; *Cross v. Lewis*, 2 B. & C. 686; *Williams v. Morland*, Ib. 910; *Livett v. Wilson*, 3 Bing. 115; *Gray v. Bond*, 2 Brod. & B. 667; *Wright v. Howard*, 1 Sim. & St. 190; *Ingraham v. Hutchinson*, 2 Conn. 584; 2 B. & Ad. 304; *Stiles v. Hooker*, 7 Cow. 266; *Campbell v. Smith*, 3 Halst. 139; *Blanchard v. Baker*, 8 Greenl. 253; *Cooper v. Smith*, 9 S. & R. 26; *Strickler v. Todd*, 10 Ib. 63; *Tyler v. Wilkinson*, 4 Mas. 397; *Belknap v. Trimble*, 3 Paige, 577; *Smith v. Adams*, 6 Ib. 435; *Rogers v. Bancroft*, 20 Verm. 250; *Middleton v. Gregorie*, 2 Rich. 631.

(2) *Goodrich v. Knapp*, 3 Kent, 447, n.; *Johnson v. Lewis*, 13 Conn. 303.

(3) 3 Kent, 441.

(4) *Twiss v. Baldwin*, 9 Conn. 291; (*Hoy v. Sterrett*, 2 Watts, 327.)

A sold land and water privilege to B, with a covenant that B should only use the privilege for a paper-mill. A and B mortgaged their respective interests, and they were finally sold, and both became vested in C. He changed the paper-mill into a cotton-mill. The property was again sold on foreclosure of A's mortgage, and became vested in different persons. Held, the different use of the water did not forfeit the right to use it for a paper-mill, and the purchaser under A's mortgage was entitled to an injunction, to restrain the owner of the other lot, from using the water power for any other purpose. *Wells v. Chapman*. 4 Sandf. Ch. 312.

A and B were tenants in common of certain land, and of a saw-mill thereon, standing on the north side of a stream passing through the land, and of a bark-mill upon the south side, both mills being moved by means of the same dam; and they executed, at the same time, partition deeds, each to the other. A conveyed to B all on the north side of the stream, without any mention of the water, or water privilege, and the deed from B to A contained this clause: "Also, the tanyard add bark-mill, with a privilege of water for the said bark-mill, when I, the said B, my heirs or assigns, do not want the water for the use of the works now standing on the said dam, or any others to be erected hereafter, that draw no more water than those now standing." Held, this gave to the owner of the saw-mill a paramount right to the use of the water for his mill, or for any other works drawing no more water; but that this right was confined to works supplied with water by means of the same dam, then standing, or one substituted for it, in case of its destruction; and that it did not give to B, or his assigns, the right to claim, that an amount of water, equal to what would be required for such works, should be allowed to pass over that dam, and be collected in a pond raised by a dam built below, and be there used, to supply mills by means of such lower dam. *Rogers v. Bancroft*, 20 Verm. 250.

right, but did not prevent them from acquiring one by an actual use, substantially general and continuous.(1)

29. An owner below acquires no adverse right by a long continued use of the water, unless there was an actual occupation of the flow of water upon the land above, for the requisite period. It is not sufficient, that the water had been used to flow uninterruptedly through the land above for any length of time.(2) So, though land may have been flowed by a dam more than twenty years, a prescriptive right is not established by the defendant, unless the occupation was by himself, or some person under whom he claims.(3) So, where A had been in possession of land for nearly thirty years, above which on a stream was a dam, by which the water was kept from overflowing A's land, until it could be carried off by ditches through the same, and the owner of the dam cut it through, and thereby overflowed A's land; in an action by A, held, there was no subject of a grant, and no adverse possession by A, and therefore no easement, whose interruption would give a claim for damages.(4)

30. A prescriptive right to raise the water to a certain height by a dam, relates to the height of the water, not to that of the dam. Hence, if by repairing the dam, the height of the water is increased, though that of the dam is not, an action lies. But where there was a prescriptive right to raise the dam to a certain height, and the water in proportion; but in consequence of leaks, waste of water, bad machinery, &c., the water had not usually risen to such height; and, by repairing the dam, the water again rose to the former point: held, the law did not give any claim for flowage.(5)(a)

31. In addition to the prescriptive right in a water-course, acquired by long usage, reference is sometimes made to the right, said to be applicable alike in the cases of air, light and water, which is gained by *priority of occupancy*, without reference to the continuance of such occupancy. This right, if it exists, has the effect of securing the first occupant against any such use of the stream by another proprietor, as will impair the beneficial privilege of the former in using the water for irrigation, or mill purposes; provided, however, that he has not diverted the stream from its natural course, or essentially destroyed its use by owners above and below him. It is said, a right by prior appropria-

(1) *Bolivar, &c. v. Neponset, &c.*, 16 Pick. 241.

(2) *Hoy v. Sterrett*, 2 Watts, 327.

(3) *Benson v. Soule*, 32 Maine, 39.

(4) *Felton v. Simpson*, 11 Ired. 84.

(5) *Stiles v. Hooker*, 7 Cow. 266; *Cornell v. Thayer*, 5 Met. 253.

(a) The acquisition of a right to flow lands, by prescription, for one purpose, is not prevented or defeated by the existence, at the same time, of the right in another person, to flow the same lands for another purpose. *Davis v. Brigham*, 29 Maine, 391.

Thus, the right of one to flow lands, for floating timber, will not prevent others from acquiring a prescriptive right to flow them, for the purpose of working their mills. *Ib.*

So, although the latter use of the water, during some weeks of each year, is interrupted by its use for the floating of timber. *Ib.*

So, although the mill owners were not the owners of the dam; as a complaint for flowage lies against the occupant, as well as against the owner of a dam. *Ib.*

So, though the flowing was occasioned by two dams built by two different persons, one of which was higher up the stream than the other; provided the water was used for the same purpose, and the lands were flowed to the same extent, during the 20 years in which the prescription was running. *Ib.*

tion, has regard to the quantum of *water* withdrawn from a stream, and not to the quantum of *fall*.(1)

32. In Massachusetts, it has been held that one who first improves a stream, by erecting a dam and mill upon it, has an exclusive right to the water for such purpose, even though he thereby wholly destroys the privileges above and below. But this doctrine has been denied by Judge Story. And in the same State, it is held, that though an owner may use the water for watering cattle, or irrigating the land, yet he must use it in the latter mode, so as to do the least possible injury to an owner below, and return the surplus into the natural channel.(2)

33. In Vermont, an owner situated above one who has first occupied the stream, still retains a right to improve the water reasonably. But the rule adopted in Massachusetts is referred to as the common law doctrine.(3)

34. The doctrine above stated, as established in Massachusetts, finds some support in the following passage of Blackstone's Commentaries: "If a stream of water is unoccupied, a person may erect a mill thereon, and detain the water; yet not so as to injure his neighbor's prior mill, for he has, by *the first occupancy*, acquired a property in the current." The same principle is recognized in Pennsylvania, in the case of *Strickler v. Todd*. But in New York, New Hampshire, Connecticut,(a) and recently in Pennsylvania, the only superior right gained by occupancy is referred to the general principle of an adverse user for the period of legal prescription. This seems also to be the established modern doctrine in England. In Connecticut, Gould, J., was of opinion, that even where an owner below has occupied his privilege, for a time exceeding that of legal limitation, an owner above may still erect a new dam, and thereby for a time detain the water. In the case of *Tyler v. Wilkinson*, already referred to, Judge Story very clearly and satisfactorily states the distinction, between the prior occupancy of things which have no owner, and that of running water, which, as an incident to land, belongs to the respective owners of the latter. To the former, mere occupancy gives an exclusive title, but the latter can be appropriated, only by the express grant or general consent of the own-

(1) 3 Kent, 446-7; *Platt v. Johnson*, 15 John. 213; *McCalmont v. Whitaker*, 3 Rawle, 90.

(2) *Martin v. Bigelow*, 2 Aiken, 184.

(3) 2 Bl. Com. 403. (See *Frankum v. Falmonth*, 6 Carr. & P. 529; *Strickler v. Todd*, 10 S. & R. 69; *Palmer v. Mulligan*, 3 Caines, 307; (*Platt v. Johnson*, 15 John. 213; *Gilman v. Tilton*, 5 N. H. 231; *Wright v. Howard*, 1 Sim. & Stu. 203; *Rex v. Directors, &c.*, 12 E. 429; *Bealey v. Shaw*, 6 E. 208; *Bullen v. Runnels*, 2 N. H., 257; *King v. Tiffany*, 9 Conn. 291; *Ingraham v. Hutchinson*, 2 Conn. 584; *Hoy v. Sterrett*, 2 Watts, 327.

(a) In Maine, the point has been suggested as a questionable one. 8 Greenl. 269. And it has been recently decided, that priority of appropriation confers no exclusive right. A riparian proprietor, who owns both banks, has a right to have the water flow in its natural current, without any obstruction injurious to him, over the whole extent of his land, unless his right has been impaired by grant, license, or an adverse possession of more than twenty years. *Heath v. Williams*, 25 Maine, 209.

It is held, that the common law affords the owner of land a protection against the flow of water back, to the injury of his mill, by the acts of another, without showing any priority of appropriation, or statute provision. If he fails, otherwise, to obtain relief, he may enter upon the land of the person causing the injury, and remove, so far as is necessary, the obstruction which occasioned it. 1b.

In Illinois, throwing back water upon the land of another is actionable, though the act be *per se* lawful. And priority of occupation makes no difference. *Stout v. McAdams*, 2 Scam. 69. *Hill v. Ward*, 2 Gilm. 285. The same doctrine is recognized in Georgia. *Hendrick v. Cook*, 4 Geo. 241.

ers, or by an exclusive and uninterrupted enjoyment for twenty years, which raises a conclusive presumption of a grant or right. Judge Story supposes that such right may be gained, not only by presuming a grant, but wherever, by possibility, a right may be acquired in any manner known to the law.

35. In a late case in England, A, an owner above, erected a mill, and, for the purpose of carrying it, diverted the water which had previously flowed by the land of B below. Ten years afterwards B erected a manufactory, and, as necessary to its operation, claimed that the stream should be restored to its old course. Held, A had gained no right by his prior occupancy.(1)

36. If an unoccupied mill-site be abandoned by the owner, evidently with an intent to leave it unoccupied, it seems other owners above and below may improve their privileges, without reference to the former. But abandonment requires an entire disuse for twenty years.(2)(a)

37. On the other hand it is observed, that where one owner unlawfully appropriates the water to the injury of another, it matters not whether the mill of the latter be an ancient mill or otherwise. It is sufficient to allege in the declaration for diverting the water, *debet et solet currere*, and the plaintiff may even recover, though he have erected no mill.(3)

38. The general rule, which forbids one owner upon a stream to divert it to the injury of another, is said to be subject to an exception *in favor of husbandry*. Thus, it has been held in Connecticut, that such owner may use the stream for irrigating his meadows; on condition that he leave enough water to an owner below for culinary purposes, and for the use of his cattle, and also that he restore the water to its natural current after watering his ground. And, subject to these conditions, he may so use the water, as to have the whole absorbed in his land, by virtue of his upper location.(4)

39. So, it has been held in Massachusetts, that an owner may use the water for agricultural purposes, such as irrigating the land, or supplying his cattle, either by dipping it up, or conveying it in small sluices; upon condition, however, of restoring the surplus water to its natural channel, and of using the water for irrigation, so as to do the least possible injury to his neighbor, who has the same right.(5)

40. But, in the same State, where one owner upon a stream has not merely enjoyed its natural benefits, but has erected and maintained expensive works, and acquired a prescriptive right to use the water for carrying them; another owner has no right to render them useless by applying the water to purposes of irrigation. Nor can the water be so

(1) *Mason v. Hill*, 3 B. & Ad. 304.

(2) *Hatch v. Dwight*, 17 Mass. 289; *Hurd v. Curtis*, 7 Met. 94.

(3) *Brown v. Best*, 1 Wils. 174; *Rutland v. Bowler*, Palm. 290; *Palmer v. Heblethwaite*, Skin. 65, 175; *Cox v. Matthews*, 1

Ventr. 237; *Sands v. Trefuses*, Cro. Car. 575.

(4) *Perkins v. Dow*, 1 Root, 535; *Ib.* 527; 2 *Swift's Syst.* 87, *Haywood v. Mason*.

(5) *Bent v. Wheeler*, Sull. on L. T. 273; *Weston v. Alden*, 7 Mass. 136; *Anthony v. Lapham*, 5 Pick. 175.

(a) A, a mill owner, had a grant of the right to flow certain land. The mill and dam having fallen to decay, the flowing ceased, and a road was made over the land. A then granted to B his privilege and right of flowing. Held, B had no right to flow the road by a new dam on the site of the old one, but such dam was a nuisance. *Com. v. Fisher*, 6 Met. 433.

applied by stopping it with a dam, so that much of it is absorbed or evaporated, and the residue not restored to its channel.(1)

41. There are other authorities, which seem to render very questionable the right of irrigation above referred to. Chief Justice Swift considers the cases decided in Connecticut as subversive of the common law, rule, and contradictory to a statute of that State. He also remarks, that by the decision in *Haywood v. Mason*, not only are owners below deprived of their rights in favor of those above, but even the use of a privilege for seventy years is denied to give any exclusive right. In Maine, the right of irrigation is held to be not unlimited, but subject to the rights of other proprietors. The water must be returned to its channel.(2) So, in Pennsylvania, a supra riparian owner is liable to the owner of the land below him, for every material diminution of the flow of the water by a diversion from the stream for irrigation; and this, though no actual injury may have been suffered.(3)

42. A, having the right to irrigate his meadows by means of a dam of loose stones, and at times a board or fender, fastened the board with two stakes, which had never been done by those under whom he claimed. Held, B, another owner, had no right to remove both the board and the stakes.(4)

43. It has been held in England, that where an owner upon a stream had been *long in the practice* of watering his meadows, but only between Saturday night and Monday morning, he had no right to use the water for this purpose at other times.(5)

44. From a view of all the authorities upon this subject, Mr. Angell draws the conclusion, that substantially the same rule applies to the use of a stream for the purpose of irrigation, which has been already stated as governing its use for other purposes; viz., that for any slight injury the law does not justify an action, while an essential diminution of the water *for any purpose* is a ground of damages.(6)(a)

(1) Colburn v. Richards, 13 Mass. 420; Anthony v. Lapham, 5 Pick. 175.

(2) 1 Swift's Dig. 111; Ingraham v. Hutchinson, 2 Conn. 584; 8 Greenl. 266.

(3) Miller v. Miller, 9 Barr, 74.

(4) Greenslade v. Halliday, 6 Bing. 379.

(5) Strutt v. Bovingdon, 5 Esp. 56.

(6) Ang. 33-4; Embrey v. Owen, 4 Eng. L. & Equ. 466.

(a) In case of a *spring*, it has been held, that the party in possession of the land where it is situated may use it for culinary purposes and watering cattle, even by artificial means; as, for instance, by an aqueduct leading to his house and barn. And, although the surplus water was not returned to the stream before it reached the land of an owner below, but escaped, and either watered the land of the owner above, or was lost by flowing through small apertures in *penstocks* at the house and barn, made from necessity to keep it pure in summer and from freezing in winter; held, the owner below could maintain no action. So although the defendants used it at a point lower than where it naturally entered the plaintiff's land. *Wadsworth v. Tillotson*, 15 Conn. 366. In Illinois it is held, that if the supply of water is no greater than the riparian proprietors need for the *natural* uses, none of them can subtract it for purposes of irrigation or manufacturing. The question is for the jury. *Evans v. Meriweather*, 3 Scam. 494.

Action on the case, founded on an *irrigation*, against a riparian proprietor above, by a mill-owner below. It appeared that the irrigation did not take place continuously, but only at intermittent periods, when the river was full, that no damage was done thereby to the working of the mill, and that the diminution of the water was not perceptible to the eye. Held, that this was a reasonable use of the water by the defendant, for which no action could be maintained. *Embrey v. Owen*, 4 Eng. Law and Eq. 466.

Plea—first, the general issue; secondly, that J J was possessed of four closes on the bank of the stream above, and of the bed of it up to the middle, that the water immemorially flowed over that part of the bed, and that, in January, February and March, when the

CHAPTER LXX.

WATER-COURSES—TITLE TO A WATER-COURSE[†]; ITS NATURE AND EXTENT; HOW CONVEYED, RESERVED, ACQUIRED, OR EXTINGUISHED.

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| 1. Cannot be taken without compensation, for public uses.
6. By what terms conveyed or devised.
12. A qualified right may be transferred.
14. Conflicting rights of several owners. | 17. Exception or reservation in a conveyance.
27. Parol agreement; license; acquiescence, &c.
30. Extinguishment—unity of possession—title by prescription. |
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1. THE right to a water-course is a *freehold right*, and, therefore, like other property, it cannot be constitutionally taken from the owner for public uses, without an adequate compensation.^(a) (*Supra*, ch. 69.)

water was more than sufficient for the use of the mill, the defendant, as the servant of J J, diverted small and reasonable quantities of the water for the irrigation of those closes, which excepting such small quantities as were absorbed and used in the irrigation, were returned into the stream above the mill, &c. The plea then averred, that the diversion was not continuous, but intermittent, that the quantities of water absorbed and lost were very small and unappreciable, and that the diversion caused no damage or impediment to the plaintiff's mill. To this plea the plaintiff replied *de injuria*. At the trial, the judge, in directing the jury on this plea, told them that he felt great difficulty in affixing a legal meaning to the term "unappreciable," but suggested that it might mean "so inconsiderable as to be incapable of value or price;" and the defendant obtained a verdict generally." The court inclined to think this interpretation of the word "unappreciable" erroneous, but, considering the defendant was entitled to succeed on the general issue, refused to set aside the verdict, if he would consent to its being entered for the plaintiff on the special plea. *Ib.*

(a) A corporation was authorized by charter to make sluices, locks, and dams on a river, for the passage of rafts and boats paying toll, and provision was made for compensation to parties damaged. The corporation erected certain dams, &c., and leased for twenty-five years certain premises upon which in part they erected another dam, with a sluice and locks, and occupied under the lease for thirty-one years. No damages for these premises were ever claimed or assessed under the charter. Held, that these, as well as the other parts of the works, must be considered as erected and maintained by virtue of the charter, and rightfully existing there as the property of the corporation, after their occupation under the lease terminated; that they were entitled only to such use and appropriation of the water, as might be necessary for the full and convenient operation of the works authorized by the charter, for which, and the damage from the erection of dams, sluices and locks only, would the riparian proprietors be entitled to compensation; that the riparian proprietors might use the surplus in any manner (in which they might use the water if no works existed) not inconsistent with the full and convenient use of that to which the corporation were entitled, and not injurious to their works; and that the corporation gained no claim to the surplus, by using it for more than twenty years, by virtue of the lease. *Green v. Hancock*, 31 Maine, 42.

A person, under the authority of the legislature, has a right to erect a dam upon a stream in which he is interested, as a tenant in common; but not so as to encroach upon the rights of others. *Moffett v. Brewer*, 1 Greene, 348.

Where a canal company, under the authority of their charter, erected their canal on the land of A, in a way to throw back the water of a natural water-course on the land of B, the latter is entitled to an action for the nuisance. *Delaware, &c. v. Lee*, 2 New Jer. 243.

A purchaser of a tract of government land, which has on it a mill and dam, which cause the water of a stream running through it to overflow other public lands, the entry being made and a patent received in the usual form; has no right to continue the dam so as to overflow such other lands, after they have been entered by individuals. *Wilcoxon v. McGhee*, 12 Ill. 381.

A railway was constructed across certain lowlands adjoining the river D, over which the flood-waters of that river used to spread themselves. These lowlands were separated from the plaintiff's lands by a bank, constructed under certain drainage acts, which protected the plaintiff's lands from floods. By the construction of the railway without sufficient openings, the flood-waters could not spread themselves as formerly, but were penned up and flowed over the bank upon the plaintiff's lands. There was no express clause in their act, obliging

2. An act of the legislature empowered the trustees of a village to take measures for supplying it with water, by making reservoirs and conduits in the lands of individuals; and provided a compensation to the owners of land adjoining the spring which was to supply the water, but not to those who bordered upon the natural stream which the spring supplied. Held, Chancery would, by injunction, stop any proceedings to divert the stream, till compensation was provided for the latter class of owners.(1)

3. So, it has been said, that the legislature would have no right to impair the property of an individual in a stream not navigable, by making it navigable, or by applying it to public use by means of artificial works.(2)

4. An act in New York, made for establishing water communication between the lakes and the seaboard, authorized commissioners to take and use any "lands, waters, and streams" necessary to the object in view, assessing the damage sustained by the owners or *parties interested* in such premises. Under the act the waters of the Chitteningo creek were diverted, upon which, by virtue of a grant from the State, private works had been erected. Held, the owner of such works was entitled to damages.(3)

5. But it has been held in England, that where, by means of certain public improvements authorized by law, the water of a fresh river was rendered brackish and unfit for the use of a brewery, which was dependent upon it for a supply, and was, in consequence, afterwards abandoned; the owner of the brewery was not entitled to compensation, having proved no easement arising from long use, nor any right to the water but what was common to all.(4)

6. As the title to water passes with the land over which it flows, so it may pass in connection with other lands or buildings, to which the use of the water is necessary or incident.(5)(a)

7. Thus, where the owner of a house and adjoining land lays a conduit and pipes in the latter for the use of the former, through which water is conveyed to the house; and then sells the house and *appurtenances*, excepting the land; the purchaser is entitled to the conduit and pipes, and may enter the land, and either repair them, or lay new ones.(6)

8. The devise of a mill, with the appurtenances, passes both the

(1) *Gardner v. Newburgh*, 2 John. Cha. 162. *Goldfinch*, 1 B. & C. 205; *Rex v. Commrs.* &c., 12 E. 477; *Scales v. Pickering*, 4 Bing. 448.)

(2) *Canal, &c. v. People*, 5 Wend. 423. (See *Platt v. Johnson*, 17 John. 195.)

(3) *Jennings*, 6 Cow. 618.

(4) *Rex v. Directors, &c.*, 12 E. 429. (See *Dyson v. Collier*, 5 B. & A. 600; *Hollis v.*

(5) See *Nitzel v. Paschall*, 3 Rawle, 76; *Dyer v. Depui*, 5 Whar. 584.

(6) *Nichols v. Chamberlin*, Cro. Jac. 121.

the railway company to make openings for flood-waters in that district, but there was a general provision, that they should make openings when the railway crossed any public drains, embankments, or works in any drainage district. Held, although they might not be compellable by *mandamus* to make openings for the flood-waters in that district, yet an action would lie against the company for the injury to the plaintiff's lands. *Lawrence v. Great Northern, &c.*, 4 Eng. L. & Equ. 265.

(a) But not by parol. Thus, previous to a sale of land to the plaintiff, the vendor said to him, that the defendant had no right to flow the land, and afterwards conveyed the land to the plaintiff with covenants of warranty. Held, in the absence of fraud, the verbal statements were merged in the covenants. *Sargent v. Gutterson*, 13 N. H. 467.

water and the piece of land used in connection with such mill. So, a conveyance in this form has been held to pass the water privileges, though accompanied by a declaration of the grantor that he neither bought nor sold the latter. So, the use of a head of water or a race-way, connected with and necessary to a mill, passes by a deed of the latter; as, for instance, where it is conveyed by metes and bounds, excluding the race, which runs along the bank of the stream and empties into it upon other land of the grantor. So also, the right of flowing the grantor's lands, so far as they have been used to be flowed. But where a way has been immemorially used to a mill, a conveyance of the latter, with the appurtenances, does not pass *the soil* of the former.(1)

9. Although it is the general rule of law that land cannot pass as appurtenant to land, yet it is said by Judge Story, that both in common sense and legal interpretation, a *mill* does not mean merely the building in which the business is carried on, but includes the site, dam, and other things annexed to the freehold, necessary to its beneficial enjoyment.(2)(a) So, where a testator devises pieces of property as mill-seats and for purposes of mills, he gives, with each piece of property, a water power, and the gift of the water is as permanent as the gift of the land.(3)

10. But it has been held in Maine, that the conveyance of a mill, *eo nomine*, passes no land except that covered by the building, and overhung by its projections.(4)(b)

(1) *Blaines v. Chambers*, 1 S. & R. 169; *Blake v. Clark*, 6 Greenl. 436; *Pickering v. Staples*, 5 S. & R. 107; *Wetmore v. White*, 2 Caines's Cas. 87; *New Ipswich, &c. v. Bachelder*, 3 N. H. 190. (See 10 S. & R. 63; *Hall v. Benner*, 1 Penns. 402; *Leonard v. White*, 7 Mass. 6;) *Rackley v. Sprague*, 5 Shepl. 281.

(2) *Whitney v. Olney*, 3 Mas. 280. See *Dryden v. Jefferson*, 18 Pick. 385; *Bardwell v. Ames*, 22 Pick. 333; *Ashley v. Rase*, 18, 268.

(3) *Matter of Water Commissioners*, 4 Edw. Ch. 545.

(4) *Blake v. Clark*, 6 Greenl. 436.

(a) The case was one of *devise*, but these remarks were made as equally applicable to a *grant*.

(b) So, in Massachusetts, by a grant of a mill, the land under the mill, and land adjacent thereto, so far as necessary to its use, and commonly used with it, and no further, will pass by implication. So, of an exception of a mill from a grant of land. *Forbush v. Lombard*, 13 Met. 109.

A conveyance of land, with the buildings thereon, *except the brick factory*, does not pass the land under, or the privilege appurtenant to, such factory. *Allen v. Scott*, 21 Pick. 25. A granted to B, by deed, a tract of land, bounded on all sides by the lands of persons named, excepting therefrom "the mills and water-privileges" then owned by A. At the time of this grant, about an acre of land lay common and unfenced, as a mill yard, and was used for putting timber thereon, and for passing and repassing to and from the mills, but part of that acre was afterwards used, by the owners of the mills, for a garden, and for the site of buildings not connected with the mills. Held, the latter land was not within the exception. *Forbush v. Lombard*, 3 Met. 109. Where A grants to B the right of building a dam on A's land, to carry water through a race to B's mill, and a dam is made, but insufficient for the purpose, B may erect a new dam and race, and use such land as is necessary for this purpose. *Connell v. Brookhart*, 4 B. Mour. 584.

A, the owner of land, with a mill-privilege, grist-mill, and dam thereon, made an oral agreement, with B and C, to build a saw-mill on said land and dam, one half by A, and the other half by B and C, and to use the same jointly, until it should run down. The saw-mill was built and used, according to said agreement, for several years, when A conveyed to D his land, grist-mill, and dam, "and also one-half the saw-mill, with all the appurtenances and privileges to the said half saw-mill belonging; the said saw-mill, being in common and undivided with B and C, owners of the other half, who have the privilege of using the same, in equal shares with the said D, until it shall run down. D conveyed to E the

11. A grant of *water*, or a *stream*, or *river*, passes the fishery, and also, at least under some circumstances, the right to a perpetual use of the water for hydraulic purposes. The latter principle is stated as unquestionable, where the language of the deed indicates some natural or fixed boundary to the water, as, for instance, "a certain part of a stream on Turkey River, so called; viz., beginning at the mouth of Great Turkey pond, and so extending to the head of the lesser pond." (1)

12. The owner of water may grant a qualified use of it for certain times and purposes, or in certain quantities. (a) The grant of an undivided share in a stream will not justify the grantee in using it to the damage of others interested. The right to the water is indivisible. But, where two opposite owners agree to erect a mill on the land of one, and apply the whole water to it, this is such an appropriation of the water, that a lease of the right of one tenant will pass his interest in the water. (2)

13. Conveyance of land by a corporation, with the privilege of drawing from a canal, through the forebay or tunnel, and through two metallic apertures, a certain quantity of water (measured by the number of inches,) paying rent by the inch. Held, this conveyance authorized the grantee to deliver the water from the canal only in the usual way, and not to increase the quantity by means of a *conical* tube called an *aqutage*, although the invention was known before the grant to persons skilled in hydraulics, and to some members of the corporation. Gibson, Ch. J., remarked, that the question was to be determined, not by principles of science, but by common experience, directed to the discovery of intention. (3)

13 a. The owner of land through which a stream of water passed, erected thereon a grain-mill, and raised near to it a dam, to furnish water power to drive the mill. He erected another dam, farther up the stream, to preserve water for the use of the mill below, and afterwards built a shingle-mill on the lower dam near the grist-mill, driven by the same power. He first granted to A the grain mill and land on which it stood, "with the privilege of drawing water from the mill pond sufficient for this or any other grist-mill that may be built on the ground that this mill stands on, the grist-mill having the privilege of drawing water over every other machinery on the dam." He then granted to B the shingle-mill and land on which it stood, "with the privilege of water sufficient to drive a shingle-saw at all times, except when the water is so low that the grist-mill will require it all, and then

(1) Bullen v. Runnels, 2 N. H. 259.

212; Wetmore v. White, 2 Caines' Cas. 87.

(2) Vandenberg v. Van Bergen, 13 John.

(3) Schuykill, &c. v. Moore, 2 Whart. 477.

said land, with all his right, title and interest, in and to the grist-mill and saw-mill standing thereon, "being the same premises conveyed by A to said D." A, after the death of B and C, conveyed to their heirs "one-half of a saw mill, being in common and undivided with D, and being the same that said A reserved to B and C in his deed to D." E refused to permit said heirs to use the saw-mill, and they brought a real action to recover possession of a moiety thereof. Held, that the deed from A to D reserved to B and C only a life estate in the land on which the saw-mill stood, and that the action could not be maintained. Curtis v. Gardner, 13 Met. 457. (See p. 118.)

(a) But in grants of water privileges, that construction is to be adopted, which gives the grantee an unrestricted rather than a limited one, in cases of doubt; especially where there is no provision for a forfeiture. No restriction can safely be implied from the relation of the parties, from which it might be inferred that they did not intend to enable each other to erect rival mills. Fisk v. Wilber, 7 Barb. 395.

the shingle-mill must stop, and not till then." He afterwards conveyed to A the land on which the upper dam had been erected. Held, B acquired the right to the use of the water from the upper as well as from the lower dam, when it could be taken without injury to the rights previously granted to A for the use of the grist-mill.(1)

13 *b.* Held, B had the right to draw water for the use of his shingle-mill, whenever such drawing did not thereby injure B in the use of his grist-mill, although, "there were reasonable grounds to believe the water would be needed for the use of the grist-mill."(2)

13 *c.* Held, also, that when the grant of the right of water for the use of the shingle-mill was made in express terms, the right to use the means necessary to the enjoyment of the right was also granted, by operation of law; and that B, therefore, had the right to enter upon any land then owned by his grantor, when and where necessary, to enable him to obtain his just supply of water.(3)

13 *d.* Where A conveyed to B a certain water-right, being the surplus after supplying two runs of stones, for which the right had been previously conveyed to C, the right conveyed to B being of water sufficient to carry five run of stones, to be employed on an equality with three run of stones to be used by A, and B subsequently acquired four-sixths of the right conveyed to C it was held, that the rights acquired from C must be first satisfied; that A was not at liberty to use the water or suffer it to run to waste, so as to impair that right; that, in the surplus, A and B must participate in the proportion of three to five, including, in the estimate of the water used by each, so much as was suffered to run to waste by his negligence, or suffering his flumes or other works to be out of repair; that A had not the right, by running his mills in the night time, in dry seasons, so to draw down the surplus water as not to leave to B a proper proportion in the day-time; but that B could not complain of the use, by A, in the night time, of water which would otherwise have flowed over the dam and been wasted, provided the water in the pond was not drawn down so as to impair its use, during the ordinary hours of using it by B.(4)

13 *e.* A deed, expressed to be executed for the purpose of having the business of a clothier carried on where the grantor lived, and in consideration of five shillings, conveyed to the grantee, his heirs and assigns, the privilege of drawing from the mill-pond, on which the grantor had a grist-mill, "water sufficient for carrying one fulling-mill and shears for one clothier's shop, reserving always, in a scarcity of water, sufficient to carry" the grantor's grist-mill; *habendum* to the grantee, and his heirs and assigns, so long as he or they should carry on the clothier's business, at or near said place, and should be at one-sixth part of the expense, of erecting and keeping in repair the dam and flume necessary for supplying the pond with water. Held, the grant restricted the use of the water for the purposes of a fulling-mill and clothier's works only, and did not give the right to use the same quantity of water in carrying a carding machine.(5)

13 *f.* Held, also, that the grantor and grantee did not thereby become tenants in common in the right to use the water, and that the deed did

(1) Elliot v. Shepherd, 25 Maine, 371.

(2) *Ib.*

(3) *Ib.*

(4) Seneca Woolen Mills v. Tillman, 2 Barb. Ch. 9.

(5) Shed v. Leslie, 22 Verm. 498.

not restrict the right of the grantor to use the water, not conveyed to the grantee, for other purposes than a grist-mill.(1)

13 *g.* A granted to B, by deed, a narrow strip of land, "for the purpose of enabling the grantee to erect a mill-dam;" also "the right to build, upon the land of the grantor, a mill or factory, somewhere near the north-west corner of S W's land; and also the right to dig a canal or trench from said mill-dam to such mill as may be erected; with the right of passing to and from said mill-dam and mill, over the grantor's land." B built a mill-dam on said narrow strip, and also a mill near the north-west corner of S W's land, but not on the land of A, and dug a canal from said dam, partly through the land of A, to said mill, and, six years afterwards, entered upon A's lands, through which the canal was dug, to repair and clear out the canal. Held, that said deed gave B no right to dig a canal through A's land, in any other place than that designated, namely, from said mill-dam to a mill on A's land; and A might maintain an action of trespass against B, for entering on A's land to repair and clean out the canal, even though A had acquiesced, for six years, in the building of the mill and the digging of the canal.(2)

13 *h.* County commissioners laid an aqueduct from a spring, through the lands of several persons, to the county buildings, and thereby diverted the water, which before flowed to the works of S. At or about the time when the aqueduct was laid, a lateral pipe was inserted in it, and water hereby conveyed to said works; but it did not appear by whose order or at whose expense the pipe was thus inserted. The commissioners afterwards caused the pipe to be cut off, and S was thereby deprived of the use of the water. S brought an action against the commissioners, alleging, in one count, that they had diverted the water of the spring, and, in another count, that they caused the pipe to be cut off. The commissioners, in their defence, gave in evidence a deed, executed after the aqueduct was laid, by S and others, through whose land it was laid, in which deed they recited that it had been laid with their consent, and acknowledged that they had received full satisfaction for all damages occasioned to their several lands by laying it, and in which they also granted to the county the liberty of entering upon their several lands, for the purpose of repairing, or relaying, or taking up said aqueduct, whenever the county commissioners, or any authorized agents of the county, might deem it necessary; the county to pay to the owners of said lands such damages as should be thereafter occasioned by entering thereon for said purpose. Held, that this deed was a grant to the county of the entire use of the water of the spring; that the whole damages for such use had been received by S; that if the pipe was inserted in the aqueduct before the deed was executed, the right to continue it was relinquished by the deed; that if the pipe was inserted after the deed was executed, it was either a trespass, or was done in pursuance of a parol license of the commissioners, which was revocable and had been revoked; and that, in either case, the commissioners had a right to cut off the pipe.(3)

14. Where opposite owners own a dam in common, and have a right to the water alternately, each six months; either may at any time repair his own flume, especially where the surplus water not required by

(1) *Ib.*(2) *Dickerson v. Mixter*, 13 Met. 217.(3) *Stanwood v. Kimball*, 13 Met. 526.

one belongs to the other. And the party making the repairs is not answerable for any accidental damage thereby occasioned to the other. So the former, after an unavoidable accident in repairing, and to prevent great injury to both parties, may raise the waste gate, and remove the flash board of the latter.(1)(a)

15. Where one mill is entitled only to the surplus water after another is supplied, the owner of the former must shut his gates in case of a deficiency of water for both. But if the owner of the latter obstructs the passage of the water to the other mill, he must remove the obstruction so soon as his own want is supplied.(2)

16. A was the proprietor of an ancient mill, and a stream which supplied it, diverted from a river. B owned other mills, with a stream above, diverted from the same river by a head wear, and thence flowing through A's land to B's mills, as appurtenant thereto. B erected upon other lands, below the lands of A, and near the water-course, two other mills, and, to obtain more water, enlarged his water-course in the soil of A, and raised and heightened the head wear, whereby so much of the water was diverted as to render useless A's mill. In order to settle the conflicting rights of the parties, A, in consideration of a sum in gross, and an annual rent, demised to B for a certain term the water-course thus enlarged, and the right of diverting so much water as was required for B's mills. Soon afterwards, A's mill was destroyed. The term having expired, but the party claiming under B continuing to use the water in the same way as before, the owner of the land, on which A's mill formerly stood, brings assumpsit against him, for use and occupation. Judgment for the plaintiff.(3)

17. A conveyance of land, a part of which is traversed by a water-course, may except or reserve the bed of the stream, or the whole or a part of the water itself; and the exception or reservation will not be void, as repugnant to the preceding grant. Thus, where one conveys a tract of land, describing the tract, but not mentioning a stream included within it, and then adds: "and it is to be understood, and it is the intention of this deed, to convey as much of the privilege of the water, as shall be sufficient for the use of a fulling-mill, whenever there is a sufficiency therefor;" this is a valid reservation of the surplus water.(4)(b)

18. The exception, in a lease, of a *mill site*, includes not merely an

(1) *Boynton v. Rees*, 9 Pick. 528.

(2) *Sumner v. Foster*, 7 Pick. 32.

(3) *Davis v. Morgan*, 4 B. & C. 8.

(4) *Sprague v. Snow*, 4 Pick. 54. See *Adams v. Warner*, 23 Verm. 392.

(a) Where land was sold by public commissioners, as bounding upon a river, and was situated just below a State dam erected for a canal; held, the purchaser was entitled to the water privileges connected with the lots at the time of sale, by the natural flow of the surplus water over the dam, so far as the same could be applied to use, and to the thread of the river, not obstructing its navigation; and that the commissioners, therefore, had no right to lease such privileges. *Varick v. Smith*, 9 Paige, 547. Where A conveys a mill to B, covenanting that the pond shall be, and forever remain, as it is at the time of conveyance, A and others being owners of the land under such pond; the law construes this into a covenant, that such owners will not interfere with the dam, as built, and the pond; not a covenant against acts of God, or acts of the government. *Oldham v. Kennedy*, 3 Humph. 260. A conveyance of the ground on which the abutment of a dam stands, with all rights, &c., thereto belonging, passes the whole water-power created by such dam. *Wall v. Cloud*, Ib. 181.

(b) Where part of the land conveyed is flowed by a dam of the grantor, there is no implied reservation of the right to flow. But a prior grantee of the mill may claim such right against a grantee of the land. *Hinman v. Booth*, 21 Wend. 267. (See p. 114.)

easement, but the soil of the mill site, and all the land necessary for the pond, and for carrying on the mill.(1)

19. Demise of a fulling-mill, with a water-course and flood-gates, with an exception of free liberty to the lessor, his heirs, &c., servants and tenants, at all times at pleasure to divert the water from the mill, for watering all meadows which they should think proper, and to take up and put down all proper sluices. The profits of the mill consisted in part of water rents for flooding meadows, for water which was wholly diverted from the mill. Held, the exception was not repugnant to the grant, but the heir of the lessor was entitled to the water rents.(2)

20. Conveyance of a mill, dam and slip, reserving the right of slipping the grantor's own logs, free of toll. Held, the reservation created a mere personal right, not assignable.(3)

21. An exception of all places which may be found convenient for erecting mills on a certain creek, applies only to natural, and not to artificial mill sites.(4)

22. A lease reserved all water-courses, suitable for mills, with the right of erecting mills and other works thereon, with three acres of land adjoining. Held, this amounted to a reservation of all the mill-seats, with the three acres, and gave the lessor the right to make a location at pleasure; but that the interests reserved did not pass by a subsequent conveyance of the reversion.(5)

23. A, owning the bed of a stream, and the land upon one side, conveyed to B, the owner on the other side, one-half the bed, to the thread of the river, *reserving* the right to butt a dam on both shores. Held, the last clause was not a good *exception*, which must be of a part of the thing granted, but it was effectual for the purpose intended, as an estoppel or implied covenant; and amounted to a mutual covenant, that each party should have the right to butt a dam upon the shore of the other. It was also held, that the deed gave the grantor no greater right to use the water than the grantee, notwithstanding a reservation of a right to use the water from any dam erected by the latter, upon his paying an adequate proportion of its cost.(6)

24. Lease by indenture from A to B of a woollen factory, reserving the right to erect a machine shop near it, and connect the machinery therein with the wheel in the factory; and in case there shall not, at any time, be water sufficient to carry the works of the factory and machine shop together, the lessor is to connect his works with the wheel of the factory, so as to use only so much water as is sufficient to carry the wheel of the factory at speed. Held, A could not exercise his reserved right of connecting the machinery of his shop with the wheel of the factory, until B had drawn water enough to drive the machinery of the factory at speed.(7)

(1) Jackson v. Vermilyea, 6 Cow. 677.

(2) Lambert v. Bennett, 3 Smith, 84.

(3) Wadsworth v. Smith, 2 Fairf. 278.

(4) Jackson v. Lawrence, 11 John. 191.

(5) Russell v. Scott, 9 Cow. 279.

(6) Case v. Haight, 3 Wend. 632.

(7) Hatch v. White, 22 Pick. 518.

The extent of an exception, in a deed conveying mills and water privileges, of "the privileges of one-half of the bark-mill owned by" certain third persons, is to be determined by ascertaining the extent of the title which such third persons had to the water at the time for the use of the bark-mill. Rogers v. Bancroft, 20 Verm. 250.

Where *tenants in common* of mills and water-privilege, execute partition deeds at the same time, each to the other, the deeds are to be taken as one instrument; and any grant or limitation of the use of water, contained in either, is to be treated as binding on both the parties and those claiming under them. *Ib.*

25. A reservation may sometimes be implied; as where the river, or an island therein, has been previously granted.(1)

26. A mortgaged to B, for a large consideration, a strip of land, including mills, and running along a river. He afterwards sold a small portion of the land to C for a mill, &c., and obtained from B, for a nominal consideration, a grant or release of this portion, described as, "beginning at the end of a dam, running up the river two rods, and so round to the bank of the river." Held, the release had merely the effect of an exception to the mortgage, and did not relinquish a right in the stream to the thread of the river, which would destroy the value of B's mills.(2)

27. The question as to the effect of a *license* has sometimes been raised in connection with water-courses. Thus, A, being the owner of a mill, made a parol agreement with B, an owner of neighboring land, by which B allowed him, for a consideration, to fix a tunnel or goit into the ground, with stone work, for the purpose of conveying water to A's mill. B helped in making the tunnel, under A's directions. A afterwards tendered the consideration, but B refused it, forbade the continuance of the tunnel, and obstructed it. In an action on the case of A against B, held, the agreement was a mere license, at any time revocable.(3)

28. Where one by deed conveys a water-course by courses and distances, a subsequent parol agreement to vary the route of it is valid, if executed.(4)

29. In Pennsylvania, a parol license to use a water-course for a mill has been so far held valid, even though made without consideration, that it cannot be revoked after the mill has been actually erected. The part performance is held equivalent to a formal conveyance. The expending money or labor, in consequence of the license, has the effect of turning such license into an agreement. Hence, not only may damages be recovered at law, for a diversion of the water; but a specific performance of the contract decreed in equity, where damages would be an inadequate compensation. With regard to the duration of such license, it must depend upon the nature of the property to which it is accessory. If the mill is of a permanent description, the license shall also be permanent, and continue in force, notwithstanding the destruction or decay of the original building, and may be revived in use upon its reerection. But if the building is a saw-mill, the use of which must depend upon fluctuating circumstances, such as the supply of timber, the parties are supposed to have contemplated a temporary use.(5) So where a license is given to erect a dam for a temporary purpose, it terminates with the decay of the dam.(6) In the same State it is held, that a parol license to abut a dam against another's land may be revoked before anything is done towards its execution.(7) It has been held, that even the silent acquiescence of one party, entitled to a water-course, in its diversion by another, will debar the former from an action for damages, though he is thereby subjected to great expense. And equity will grant an injunction against such action.(8) In Maryland, where A

(1) Lunt v. Holland, 14 Mass. 151.

(2) Hatch v. Dwight, 17 Mass. 289.

(3) Fentiman v. Smith, 4 E. 107.

(4) Le Fevre v. Same, 4 S. & R. 241.

(5) Rerick v. Kern, 14 S. & R. 267.

(6) Hepburn v. McDowell, 17 S. & R. 383.

(7) Baidelman v. Foulk, 5 Watts, 308.

(8) 2 Equ. Abr. 522.

licenses B, by a countermandable license, to divert a stream which runs through the land of both, and the license is executed by B, A cannot be restored to his original rights, except by tendering to B the amount of the expense incurred by him. By such license, and its execution by B, the right of A to the flow of the stream in its original channel is extinct, and is no longer appurtenant to the land.(1)

29 *a.* A granted a license to B, to flow water from B's land by a ditch through A's land. Held, this license gave B no right to increase the quantity of water so flowed, either by clearing more land, or by cutting more ditches, or enlarging those already dug; neither had B a right to turn a part of the water through another person's land, and then turn a new stream through A's land.(a)

30. The right of using a water-course, like other easements, may be extinguished by *unity of possession*. Thus, it is said, if A owns above, and B below, on the same stream, and B acquires the right of having the water flow to his land through A's, and then A purchased B's land, and diverts the water into its natural channel, C, a purchaser of B's land from A, cannot claim the artificial channel, because it was extinguished by unity of possession.(3)

31. In this case it is to be observed, that at the time of the sale to C, the artificial channel was no longer in use. And it seems the mere union of the two rights in one person would be insufficient, without such disuse, to effect an extinguishment. Thus, in an old case, where A owned a tenement, to which there was an ancient gutter through the tenement of B, and, having purchased the latter tenement, sold the former to C, it was held, that the gutter was not extinguished; though it would have been, had A, after the purchase from B, destroyed or severed it. So where one constructs pipes through his land, to convey water to his house, which he afterwards sells, with the appurtenances, reserving the land, or reserves, selling the land, the right to the pipes is not extinguished, but passes to the purchaser in the one case, or remains in the seller in the other. Otherwise, had the pipes been cut off before the conveyance.(4)

32. A owns a mill above, and B a mill below, on one stream, the latter mill having a dam which obstructs the free use of the former. B lowers his dam two feet, at which height it remains thirty-eight years, and does not obstruct the mill above. B sells the lower mill to A, who conveys it to C. Held, the right of raising the dam two feet, and of back flowing, was gone.(5)

33. There can be no adverse enjoyment of water, where the same person owns the land over which it flows, and that which is benefitted by the use of it.

34. A conducted water from the land of B to his own, and, having used it for less than the period of prescription, in a certain way, sold his land to B, who, in a few days, reconveyed to A. A subsequently used the water as before, for a period which, added to the former use, made up the time of prescription. Held, A gained no prescriptive title.(6)

(1) Addison *v.* Hack, 2 Gill, 221.

(2) Carter *v.* Page, 8 Ired. 190.

(3) Angell, 71-2.

(4) Surry *v.* Pigott, Latch, 153; Sury *v.* Pigot, Poph. 166; Nicholas *v.* Chamberlain,

Cro. Jac. 121; (Morris *v.* Edginton, 3 Taun. 24.)

(5) Hazard *v.* Robinson, 3 Mas. 172.

(6) Manning *v.* Smith, 6 Conn. 289.

34 *a*. Where an estate, out of which a mill privilege has been carved, becomes united in ownership with other estates below, the owner of both may convey different rights and privileges from what were before attached to either estate; but in conveying either to different and new persons, any change in the privileges made appurtenant to each must distinctly appear, or each will be presumed to exist as before the junction of the estates.(1)

35. The principle of extinguishment by unity of possession applies only to artificial channels, the right to which depends on prescription; and not to a natural water-course, existing *ex jure nature*.(2)

36. After possession of a water-course for sixty years, one may have a bill in equity against a mortgagee who has foreclosed, to quiet his title, without having established his right at law.(3)

37. In Massachusetts, at the first settlement of the town of Concord, a century and a half before action brought, a small stream was reserved for the use of the mill. The stream had for sixty years been used by a mill of the plaintiff, and the defendant, through whose land it naturally flowed, diverted and wasted the water. Held, the plaintiff had a right by prescription.(4)

38. Mr. Angell says, whatever period of time the statute of limitations may prescribe for enforcing a right of entry, an adverse enjoyment of a water-course in any particular manner, for such period, will be presumptive evidence of a grant. This doctrine was first laid down as law in England, in the year 1761, in the case of *Lewis v. Price*, at Nisi Prius.(5)

39. Occasional interruptions of the use of a water-course will not always be conclusive of a superior right to control and limit the entire use at discretion. The nature, object and value, of the use are very material to explain and qualify the effect of such interruptions. For instance, it is not to be presumed, that valuable mills will be erected, to be fed by an artificial canal from a river, and the stream be indispensable for such mills, and yet that another person has such a title to the stream, that he may cut off, diminish, or suspend it at pleasure; but, if there should not be water enough for the progressive wants of all, the riparian proprietor should reserve to himself the right of future exclusive appropriation. In such cases, reasonable presumption must be made from equivocal acts. The interruptions may arise, from resistance to an attempt by the canal owner to extend the reach of his dam into the stream, for the purpose of appropriating more water, or from a desire to prevent undue waste in dry seasons, to the injury of the riparian proprietor. But the consent of a mill-owner, to an exclusive appropriation of the water by such proprietor at his pleasure, will never be presumed without the strongest evidence.(6)

40. A, being tenant for life of land upon a stream, with power to make a jointure, which he exercised, licensed B to construct a wear in the stream upon A's land, for the purpose of watering B's meadows. A and the jointress having occupied 52 years from the license; after

(1) *Perry v. Parker*, 1 W. & M. 280.

(2) *Surry v. Pigott*, Poph. 166.

(3) *Bush v. Western*, Prec. Cha. 530;
(*Duke v. Girdler*, Ib. 531; *Hillary v. Waller*,
12 Ves. 261; *Finch v. Resbridger*, 2 Vern.
390.)

(4) *Sullivan on Land T.* 273.

(5) *Angell on W. C.* 77; *Ricard v. Williams*, 7 Wheat. 59; 2 Wms. Saun. 175.

(6) *Ang. 85*; *Tyler v. Wilkinson*, 4 Mas.
404.

the death of the latter, C, the tenant of A's land, diverted the water from the wear. In an action by the tenant of B's farm against C, held, C was not bound by the adverse user during the lives of A and the jointress.(1)

41. A prescriptive right may be acquired to the flow of the water in a particular artificial channel, even though it is neither actually used, nor necessary for the mill erected. It is sufficient, that the water has been accustomed to flow in this course for twenty years.(2)

42. The ordinary prescriptive title to a water-course can be gained only against individuals, not against the public. Hence, the exclusive use of a river for twenty years will not debar the public from using it as a highway, even though during that time it has been in a condition wholly unfit for such purpose. To affect the public right of navigation, there must be either a legislative act, or an enjoyment so very long continued as to raise a presumption of one.(3)

43. One may gain a right, (in Pennsylvania,) to abut his dam upon another's land, by an actual possession of it for that purpose for twenty-one years.(4)

CHAPTER LXXI.

WATER-COURSES, ETC. FLOWAGE.

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| 1. General rule. | 9. License—when no defence. |
| 4. Applies to land below, as well as that above. | 11. Construction of particular grants and reservations. |
| 5. Right of flowing an incorporeal hereditament—how acquired. | 18. Prescriptive right. |
| 7. Right of election. | 25. Unity of possession—extinguishment. |

1. WHERE a stream, by the act or neglect of the owner, is made to *overflow* adjoining land, this is an actionable injury; and the law presumes damage. Thus, if this consequence arises from the neglect to scour a ditch,(a) an action lies.(b) So, where one digs a ditch, where-

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| (1) <i>Bradbury v. Grinsell</i> , 2 Wms. Saun. 175 d. | <i>Burr</i> . 2163; <i>Nimmo v. Com.</i> , 4 Hen. & M. 57; |
| (2) <i>Tyler v. Wilkinson</i> , 4 Mas. 405. | <i>Stoughton v. Baker</i> , 4 Mass. 522; <i>Vooght v.</i> |
| (3) <i>Weld v. Hornby</i> , 7 E. 195; <i>Johnston v. Irwin</i> , 3 S. & R. 292; <i>Carter v. Murcot</i> , 4 | <i>Winch</i> , 2 B. & A. 662; <i>Chalker v. Dickinson</i> , 1 Conn. 382. |
| | (4) <i>Beidelman v. Foulk</i> , 5 Watts, 308. |

(a) Where a ditch is the boundary between adjoining proprietors, one of whom is entitled to clean it out; he has no right to remove a fence, standing partly on the land of the other, unless absolutely necessary in order to clean the ditch. *Johnson v. Hannahan*, 3 Strobb. 426.

(b) One whose land is flowed unlawfully has an election of remedies. He may bring his action for damages, or he may abate the nuisance without suit. If he take the latter course, he must proceed in a reasonable manner. The ordinary pleas to an action of trespass, founded on the exercise of such alleged right, set forth in substance that the defendant, or those under whom he acted, had the right to protect their possessions, and that the acts were done necessarily in the exercise of the right, or with as little damage as possible. But he need not abate the nuisance in the manner *most convenient* for the other party. *Great Falls Co. v. Worster*, 15 N. H. 412.

Where an owner of land, flowed by a dam, said to another person, that he gave him "all the power that he might lawfully have to draw the water raised by said dam off from his

by water flows from his brewery to an old clay pit in the brick yard of the plaintiff.(1)(a)

2. In an ancient case, the cause of action alleged was, that the defendant raised his pond, and thereby flooded the plaintiff's meadow, and the plaintiff recovered. So, where the plaintiff complained of the defendant for stopping water *incessanter decurrente* by his land, whereby the plaintiff's land was drowned, and his grass rotted; the plaintiff prevailed.(2)

3. Where the land of one person is overflowed through the act of another, the former may erect any obstruction which may be necessary to keep off the water, and will not be answerable for damages thereby occasioned to the wrong-doer. But he cannot lawfully cause damage to third persons by such erection.(3)(b)

(1) 3 Bl. Com. 217; Shaw v. Cumiskey, 7 Pick. 76; Woodman v. Tufts, 9 N. H. 88.

(2) Gilbert's case, Godb. 59; Brent v. Had-don, Cro. Jac. 556; Lev. 193; Ang. 61, 62; Sir Neil, &c. v. Earl, &c., 3 Bligh, 414.

(3) Merritt v. Parker, 1 Coxe, 460; Rex v. Thrafford, Ang. 107; Williams v. Gale, 3 Har. & J. 231.

land," the court cannot say that this does not constitute such person his servant or agent to abate the nuisance. It might be submitted as a question for the jury, on the whole evidence, whether or not such authority was in fact given, depending upon the intent of the party making the declaration. Such a right is not assignable. *Ib.*

(a) A, being the owner of a house, and B his tenant, C, owner of the adjoining premises, allowed a drain or water-course to become obstructed, and flow back upon A's house. Held, A might maintain an action, though B allowed a wall to fall into and obstruct the ditch, and C repaired as soon as he had notice. *Bell v. Twentymen*, 1 Ad. & El. (N. S.) 766.

But where, during a portion of the time for which damage was claimed for flowage of the plaintiff's land, the plaintiff was in possession, and for the remaining period had leased to a tenant, it was held, that the plaintiff could not recover for any injury to his reversion, unless he declared specifically therefor, but only for such time as he was actually in possession of the premises, while they were not under lease. *Davis v. Jewett*, 13 N. H. 88.

An injury to a reversionary interest must be so alleged in the declaration. *Ib.*

So all objections to the plaintiff's title, in an action on the case for flowage, are waived by one who attempts to show title under the plaintiff's ancestor; and, after his attempt has been defeated by the verdict of a jury, it is too late for him to say that the title is defective.

The plaintiff's possession of part of the land flowed is, by construction, held to be possession of the whole, and sufficient to put the defendant to proof of justification. *Mims v. Weathersbee*, 2 Strobb. 184.

A mill owner below has no right so to raise the stream, as to prevent the water of an owner above from readily flowing away from his mill, and thereby obstruct its operation. Nor is it any justification for such an injury, that the mill above obstructs a navigable river, and is, therefore, a public nuisance. And where A first erects a dam below, of an adequate height for the common state of the water, and B then builds a mill above, A has no right to raise his dam by means of flash boards to a level with the bottom of the wheel of B. But if A owns on one side of the stream, and B on the other, and also on both sides below, and the former runs a dam wholly across, B may rightfully raise the water below. *Aldred's case*, 9 Rep. 59; 1 B. & A. 258; *Butz v. Ihrie*, 1 Rawle, 218; *Sherwood v. Burr*, 4 Day, 244; *Stilds v. Hooker*, 7 Cow. 266; *Hepburn v. McDowell*, 17 S. & R. 383; *Sumner v. Tleston*, 7 Pick. 198; *Gilman v. Tilton*, 5 N. H. 232; *Hodges v. Raymond*, 9 Mass. 316; *Wright v. Howard*, 1 Sim. & Stu. 203; 9 Eng. Law Jour. 66.

As the mere diversion of the water by an owner above is an injury to the owner below, though the latter has not actually used it for mill purposes; so, also, the causing of back water, or increasing the quantity of water on his land, is an injury to an owner above, although he has erected no mill, and suffers no actual damage. *Merritt v. Parker*, 1 Coxe, 460; *Pastorius v. Fisher*, 1 Rawle, 27.

(b) Upon a similar principle, when a drain is made to discharge itself upon private land, without the owner's consent, and he has not acquiesced for twenty years, he is not liable to an action at law, nor to the process prescribed by the mill act, for raising a mill-dam on his land, and thereby obstructing the drain and flowing the cellars connected with it. *Cotton v. Pocasset, &c.*, 13 Met. 429.

4. It is no less an actionable injury to flow, or otherwise injure, land below, than land above; as, for instance, to detain the water unreasonably, and then discharge it, in such quantity, and with such force, as to damage the bank below.(1) One *tenant in common* has no right, by means of a claim upon land belonging to him alone, to flow the land owned in common, without consent of the others. They have the same rights and remedies, as if they were sole owners.(2)

5. The right to flow land by back water is an incorporeal hereditament,(a) and may be acquired by grant, the terms of which will be the measure of the right.(b) It may also be reserved in a sale of the land, and extinguished by unity of possession.(3)

6. Where, by virtue of an early, unlimited grant, land has been long flowed to a certain extent, this extent will be held the measure of the right, and cannot lawfully be exceeded.(4)

7. Where the grant is such as to require an *election* by the grantee, in order to vest an interest; this must be made in the life of the parties.

8. A granted to B a mill, with the ground and stream belonging to it, and also liberty to erect another mill in any other place on the stream with the same privileges. A subsequently conveys to C land on the same river. B having died, without electing another mill site; held, although he in his life might have done it, and thereby gained the right of flowing C's land, B's heirs or assigns could not do it after his death.(5)

9. One cannot justify the flowing of land, in an action for a private nuisance, under license from the town in which the land lies.(6)

10. The proprietors of a township voted to give lands and money to any one who would build and maintain mills upon certain land. A complied with these terms; and his mills flowed the lands of individual proprietors, owned in severalty at the time of the vote. Held, the vote was no justification of such flowing, though more than forty years had expired since the mills were built, and no damages had been claimed.(7)

11. Where the owner of a mill and dam, and of land flowed thereby, sells the former, with all privileges and appurtenances; the grantee has a right to flow the land by raising the usual head of water.(8)

(1) *Merritt v. Brinkerhoff*, 17 John. 306; *Williams v. Morland*, 2 B. & C. 910; *Shaw v. Cumiskey*, 7 Pick. 76.

(2) *Great Falls, &c. v. Worcester*, 15 N. H. 412.

(3) *Pearson v. Tenny*, 3 Dane, 14; *Thompson v. Gregory*, 4 John. 81; *Hazard v. Robinson*, 3 Mas. 272.

(4) 1 *Swift's Sys.* 86.

(5) *Vandenburgh v. Van Bergen*, 13 John. 212.

(6) *Nichols v. Pixly*, 1 Root, 129.

(7) *Stevens v. Morse*, 5 Greenl. 26.

(8) *Hathorn v. Stinson*, 1 Fairf. 224.

(a) So, a right granted to convey water through land of the grantor, by a race to the mill of the grantee, is an incorporeal hereditament. And for an injury to such right, trespass will not lie. *Baer v. Martin*, 8 Blackf. 317.

(b) It is an *easement*, which may be attached by the grantee to his lands as an incidence or appurtenance. *Morgan v. Mason*, 20 Ohio, 401.

When the water is taken from such dam to the lands of the grantee by means of a race, and a mill built thereon, a judgment subsequently rendered against the grantee attaches as a lien, not only upon the land, but also upon the easement, which has become a part thereof, and a sale of the land with the mill, under such judgment, carries with it the full benefit of the easement, also. *Ib.*

So, although the description of the land in the levy is by metes and bounds, and the easement not expressly described or alluded to, in such levy; upon the principle, that it attaches to the land and mill, as part thereof. *Ib.*

12. A was owner of one mill above, and another below, a bridge; and conveyed the latter to B, with a right "to make and maintain a dam, to accommodate" such mill, of a certain height. B repaired and rebuilt, with some alteration, an old dam, which satisfied these terms; and afterwards built another dam below the bridge, of the same height, which threw more water into his pond, and injured the other mill. Held, B had a right to maintain only one dam, and not to erect a new one.(1)

13. A conveyed to B a meadow, with a covenant that he might use the surplus water after supplying a mill; which mill A afterwards conveyed to C, with notice of the prior sale. C obstructed the water-course, apparently for the purpose of compelling B to convey the meadow to him. In an action by B, the court recommended that C should secure the enjoyment of the water-course to B by deed, which C refused. B's counsel then filed a writing, binding him to release the damages upon receiving such deed. The jury, being so advised, returned a verdict for the value of the meadow.(2)

13 a. Where a patent for land, upon which stood a mill and dam, whereby adjoining public lands were overflowed, was issued in the usual form, it was held, that the right to overflow such adjoining lands was not annexed to the grant, as an appurtenance, by any natural or legal necessity.(3)

14. A and B, being joint tenants of land, and a grist-mill and dam thereupon, in 1788 made partition, A taking one-third and B two-thirds. In 1791, B built a saw-mill on his own land, which was supplied from the grist-mill pond by a trough in the dam. By means of the dam of B's mill, A's land was flowed, and, in 1797, the question was left to referees, who awarded, that the dam should remain as it was, and if, in a common season, it flowed A's land more than at the time of partition, B should pay damages. A and B expressly agreed in writing to abide by the award. In 1807, B quit-claimed to A all his interest in the grist-mill, with its privileges; but he afterwards kept up the dam, and thereby overflowed A's land. In an action for this injury, held, B had no right thus to use the water for the purpose of carrying his saw-mill.(4)

15. A, owning on one side of a stream, granted to B, the opposite owner, a right to build and keep up a dam across the stream, about sixty rods below A's mills. The dam was built more than sixty rods below, and afterwards, without any objection by A, was removed higher up, but still not within the specified distance. Held, such removal should be presumed to be within the intent of the parties.(5)

16. Where a deed contains an exception of a *mill site*, the grantor retains not a mere easement but the soil itself, and the right of necessary flowage; both as against the grantee, and all claiming under him.(6)

17. A, B and C owned land upon which was a mill, carried by placing a dam across a brook, with all the land covered by the water of the pond thus raised. The mill and dam having existed more than thirty years, partition was made by mutual releases, assigning the mill

(1) *Baker v. Sanderson*, 3 Pick. 348.

(2) 4 Dall. 147.

(3) *Wilcoxon v. McGhee*, 12 Ill. 381.

(4) *Watrous v. Watrous*, 3 Conn. 373.

(5) *Boynton v. Rees*, 8 Pick. 329.

(6) *Jackson v. Vermilyea*, 6 Cow. 677.

to A, and a part of the land covered by the mill pond to B, with the words—"brook to remain for the use of the mills, as heretofore, forever." Held, A had the right of flowing the land of B, as far as it had been usually flowed by previous dams, and not merely the right to use the water for his mill. The volume of the brook having been for many years artificially increased, for the use of the mills, the words above quoted meant, that it was so to remain forever. The soil passed to B, A reserving a right to cover a portion of it with water. Or, if the provision could not operate as a reservation, B might be considered as *estopped* by the acceptance of his deed to demand damages, or as having given A a *license* to flow. The brook was not to remain as it was at the time of partition, when the dam was depressed by decay or otherwise, but the latter might be put into its original and finished state.(1)

18. We have already considered (ch. 70) the subject of an adverse right to a water-course, acquired by prescription, or the use of it for twenty years. The general rule upon the subject is of course applicable to the raising of a stream beyond its natural height, and thereby injuring an owner above, either by flowage or otherwise.

19. Although the height, to which an owner below may raise the water, must be measured by the use; it is held that the time for which he may keep it up is not thus limited.(2)

20. Where the land of one adjoining owner has been so situated, as not to be injuriously affected by the artificial flow of the water caused by another; no presumption of a grant arises, and no prescriptive title is acquired, by a use for twenty years.

21. A, an owner upon a stream, diverted the water by a channel, through the banks of which the water percolated, and passed into the soil of B. B afterwards erected a house, the foundation of which being sunk below the soil, the water became injurious. Held, A could no longer justify filling his channel.(3)

22. A owning a mill below, and B a mill above, A was accustomed, when the water was low, to raise his dam by flash boards; but, within twenty years from the erection of B's mill, had been often ordered, and always consented, to take them down, never claiming, and even expressly disclaiming, the right to maintain them to the injury of B. Held, these facts were sufficient to repel any prescriptive claim on the part of A.(4)

23. Where the grantor of a mill reserves a privilege in his deed, it will not be lost by mere lapse of time, without some default, negligence or acquiescence on his part. Thus, a right reserved to raise the water of a dam, to be built upon the grantor's land, not injuring the mill granted, may be exercised thirty years after the grant.(5) (See ch. 60, secs. 8, 9.)

24. It has been held, in England, that the incumbent of a church is not bound by the existence for twenty years, during the time of his predecessor, of a headstock, whereby the church lands are flowed; for he would not be bound by the grant of his predecessor. The facts,

(1) *Vickerie v. Buswell*, 1 Shepl. 289.

(2) *Alder v. Savill*, 5 Taun. 454; *Stiles v. Hooker*, 7 Cow. 266; *Russell v. Scott*, 9 Cow. 279.

(3) *Cooper v. Barber*, 3 Taun. 99.

(4) *Sumner v. Tileston*, 7 Pick. 198.

(5) *Butz v. Ihrie*, 1 Rawle, 218.

however, are evidence of an *ancient* grant, unless the commencement of the erection is shown.(1)

25. Where one liable to damages for flowing land acquires a title to such land, the right to recover damages is *extinguished*, and cannot be renewed by a subsequent severance of the unity of title.(2)

CHAPTER LXXII.

WATER-COURSES, ETC. STATUTORY PROVISIONS.

1. General remarks.
2. Statutes in New England.
24. In the Middle States.

28. In the Southern States.
38. In the Western States.

1. IN most of the States, the subject of mills is regulated by statutes. These chiefly relate to *flowage*, which was considered in the last chapter. Their general purport is, to authorize the erection of dams, which overflow adjoining lands. The practice of conferring such authority originated, in Massachusetts, at an early period, (1713,) when land was of little value, and grist and saw mills were much wanted. It is said, that so great importance was then attached to mills, for the supply of food and of building materials, that mill sites were sometimes appropriated from common lands by vote of the proprietors, and often exempted from taxation. They were treated as public easements, and as of common convenience and necessity. However justifiable, in early times, upon this ground, was the appropriation of private property, or its subjection to injury, without consent of the owner; it has been contended, that the statutes in question are now an unjustifiable interference with individual rights. Mr. Angell remarks, that those whose opinions are entitled to the highest respect have questioned the constitutionality of the statutes of Massachusetts and Rhode Island, which authorize A to overflow the land of B, though the damages are to be estimated by a jury, and compensation afforded accordingly. The ground which he suggests is, that although manufacturing establishments, for whose encouragement these provisions are made, are a public benefit; yet the constitution, in allowing private property to be taken for public uses, contemplates those uses only which are *direct and immediate*, such as roads, canals, &c. Judge Parker thought, that the Massachusetts Statute was incautiously copied from the ancient colonial and provincial acts, which were passed when the use of mills, from the scarcity of them, bore a much greater value, compared to the land used for the purposes of agriculture, than at present.(3)

2. In Massachusetts,(4) any person may erect and maintain a mill and a dam upon and across a stream not navigable, upon certain conditions. No dam shall be erected, to the injury of any lawful mill above or below,

(1) Wall v. Nixon, 3 Smith, 316.

(2) Hathorn v. Stinson, 1 Fairf. 224.

(3) Amer. Jurist, 2, 30; Ang. on W. C. 118; (3 Dane, 17;) Ang. on W. C. 39, n. 3d

ed.; Stowell v. Flagg, 11 Mass. 368; Fitch v. Stevens, 4 Met. 428.

(4) Mass. Rev. St. 676-82; St. 1840, 168; 1841, 190.

or of any mill site, on which a mill or dam has been lawfully built and used, unless the right to a mill there has been abandoned or otherwise lost.(a) Any person, whose land has been overflowed, or injured, by means of a dam, within three years, may obtain compensation therefor by a prescribed form of complaint. Persons thus injured, whether owning their lands jointly or separately, may join as parties in one complaint.(b) A trial is first had upon the pleadings, as in other actions, and, if the issue is decided for the complainant,(c) or, in case of default, the court issue a warrant for a jury to estimate the damages. In making such estimate, they are to regard the injury done to other land of the party, as well as that overflowed, and also any benefit which he derives from the flowing. The complainant has judgment and execution for the damages assessed. Where the complaint alleges, that the dam is raised higher, or kept closed longer, than it ought to be; the verdict shall pass upon these points. The jury shall assess the future annual damage to be caused by the dam, and also a sum in gross for the whole injury; which last the complainant, within three months, may elect upon record to receive, and which, within three months from such election, the respondent shall pay, in order to avail himself of the provisions of the act. The damages shall be a lien upon the mill and dam, with their appurtenances, and the land under and adjoining the same, and used therewith, from the filing of the complaint, for any sum due within three years previous. An action of assumpsit or debt lies against the owner or occupant of the mill for the time being, to recover the damages for not more than three years.(d) The execution, if

(a) By a late act, (1841, 184,) no mill-dam shall be erected or raised to the injury of a mill-site on the same stream, which has been occupied by the owner, if the latter, within reasonable time after commencing his occupation, complete or put in operation a mill, for which the water is applied. By Sts. 1849, 517, the erection or maintaining of a dam, within or without the State, whereby the party knowingly causes a river, &c., to be raised, so as to flow upon or injure a mill belonging to a citizen, without right, is made a misdemeanor. But not where the courts have jurisdiction to abate such dam.

By Sts. 1854, 52, county commissioners may order dams dangerous to property to be altered or repaired, and may remove the dam of an owner not complying with such order, or alter it at his expense.

(b) Where several complaints, by different complainants, are pending at the same time, it is the duty of the court to cause all the complaints to be considered and determined by the same jury. The more correct and proper course, in such a case, is to issue only one warrant, reciting the several cases; but, if separate warrants are issued, the sheriff should regard them as a joint warrant, and cause the several cases to be tried together by the same jury. *Richardson v. Curtis*, 2 Cush. 341.

(c) All matters, which may be pleaded in bar of the complaint, are conclusively settled against the respondent, by a verdict for the complainant, on an issue tried at the bar of the court; and the respondent cannot give any of those matters in evidence to a sheriff's jury, empanelled to appraise the damage. *Charles v. Potter*, 10 Met. 37.

The question, whether a complainant has sustained damage, cannot be tried by a jury at the bar of the court, but is open to the sheriff's jury, who view the land. *Ib.*

If the owner sells and conveys the land, before he has proceeded against the mill owner, he may afterwards maintain a complaint, and have a jury to assess the damages. *Walker v. Oxford, &c.*, 10 Met. 203.

After a verdict for annual damages, allowed and recorded, the action lies, although the mill and dam are destroyed; provided the owner has not abandoned his mill privilege. *Fulmer v. French*, 10 Met. 359.

(d) See *Fitch v. Stevens*, 4 Met. 436; *Hunt v. Whitney*, *Ib.* 603. This remedy is not cumulative, but is substituted for, and takes away the common law remedy by an action of debt on the judgment. It can only be brought against the owner or occupant of the mill, and the declaration must so allege. *Leland v. Woodbury*, 4 Cush. 245.

A mortgagee, who enters and causes a tenant in possession under a parol lease from the

not otherwise satisfied, may be levied upon the premises, which shall be subject to redemption within a year, on payment of the purchase-money, with 12 per cent. interest. No action at common law shall be brought for the erection, &c., of a mill or dam. If either party is dissatisfied with the annual compensation, a new complaint, after one month from the falling due of the last annual payment, may be brought to alter it, or to assess a gross amount—the latter only after the lapse of ten years, if the complainant did not before elect gross damages. Within the month, the owner of the dam, &c., may tender, in writing, to the owner of the land, an increased compensation; or the latter may, in writing, offer to receive a reduced compensation; and if the latter, upon a complaint filed by him, fail to recover more than the amount offered, or if the former, upon a complaint filed by him, fail to reduce the sum below the amount offered; in either case, the complainant recovers no costs; but the respondent recovers costs. The offer may be made to the tenant of the mill, &c., or of the land; but no agreement, founded thereon, shall bind the owner, unless he assent to it. An agreement between the parties, if a memorandum of it be recorded in the clerk's office, shall fix the future damages, like a judgment. A verdict against a complainant is no bar to new complaint for subsequent damages. The respondent may tender a sum in court, with the same effect upon the respective rights of the parties, as in ordinary cases of tender. If accepted, the sum tendered shall be the measure of future damages.

3. In the same State,(1) where a mill, or the dam and the appurtenances thereof, owned by several persons, require repairing or rebuilding, a majority in interest of the proprietors, after all of them have been summoned to attend a meeting for this object, may repair or rebuild; and they shall have a lien upon the profits of the mill, as well as a personal claim, against the other owners, for their share of the expenses. If any share is owned for life or for years, the expense is apportioned upon the particular tenant, and the reversioner, &c., according to the value of their interest; and the profits may be retained against the latter when he comes into possession, notwithstanding any limitation by the lapse of time. A mortgagee is considered as an owner; but the mortgagor is also liable, for all that is not recovered from the former, if an action be brought before foreclosure. A tenant in tail is regarded as a tenant in fee-simple. One owner may recover from another in assumpsit; and, if more than one are indebted, a bill in equity lies, in which all equitable apportionments shall be made. These provisions shall not affect any express contract.(a)

(1) Mass. Rev. Stat. 682-4.

mortgagor, to attorn, is an *occupant*, although he does not enter for the purpose of foreclosing. *Abbot v. Upham*, 13 Met. 172.

So, a mortgagee of a mill, mill-dam and privilege, who has taken and kept possession for condition broken. *Fuller v. French*, 10 Met. 359.

(a) The owners of different mills upon one stream having agreed to pay the several sums subscribed by them to raise a reservoir for their mills; held, they thereby became liable to each other to contribute to the expenses necessarily incident thereto, including damages thereby caused by flowage; and, though one of the owners conveyed his right in his mill and in the reservoir, before judgment against the owners of the reservoir, by a land owner, for gross damages; yet he was liable to the other owners, for his proportion of such damages, according to his interest in the reservoir at the time of subscription. *Dodge v. Wilkinson*, 3 Met. 292.

4. The toll for grinding shall not exceed one-sixteenth of the grain.(1)

5. Several decisions have been made, in construction of statutory provisions, substantially conformable to those above stated.

6. It was held, (and this principle is now incorporated into the statute,) that the right of flowage could not be exercised to the injury of a prior mill-site, not absolutely abandoned.(2)

7. The statute does not provide for acquiring a property in the land of another; but merely super-adds the right of flowing land, upon compensation, by those who have legally obtained a right to build the mill.(3)

8. It has been held, (and this is now also expressly provided,) that the statutory remedy has the effect to take away the right of bringing a common law action, except in the case where the owner of the dam fails to give security for the damages, as required by the act, (a provision now superseded by the original lien acquired on filing the complaint,) or where he flows at a season which the verdict declares to be unsuitable. This construction is not open to the objection of unconstitutionality, in depriving the citizen of a remedy for a wrong actually done him; because it merely substitutes one process for another.(4)

9. It has been further held, that a recovery in a common law action is no bar to a complaint for subsequent flowage by the same dam. So a judgment, upon complaint, that the complainant has suffered no damage, is predicated upon the state of things *at the time*, and does not bar a subsequent process. Otherwise, where *some damages* are recovered; in which case no other complaint lies, except for an increase or reduction of damages, according to the statute, and one founded upon the prior judgment.(5)

10. Where the water is raised higher, or kept up longer, than the verdict authorizes, an action at common law may be brought. But if, after the height of a dam and the time of flowing had been fixed by a judgment, the mill owner should erect new mills, or introduce new machinery, requiring a greater head of water; he would probably be authorized to raise his dam to the necessary height; and the remedy would be a new complaint under the statute. For the merits of such a case could not have been before considered; and the parties ought not to be bound by the verdict.(6)

11. Complaint for flowing land ten years. Plea, that the complainant ought not to have a jury to estimate the damages for a part of the time, because until a certain day he was neither owner nor occupant of the mill or dam. Held, a bad plea.(7)

12. It was decided (and is now enacted) that the jury may take into consideration any benefit derived from the flowing by the complainant.(8)

13. A verdict, that the flowing shall not be higher than has been usual heretofore, or the dam not raised above its present height, is suf-

(1) Mass. Rev. St. 684.

(2) Hatch v. Dwight, 17 Mass. 296.

(3) Cook v. Stearns, 11 Ib. 539.

(4) Stowell v. Flagg, 11 Mass. 364; Com. v. Ellis, Ib. 464.

(5) Staple v. Spring, 10 Mass. 72; Van-deusen v. Comstock, 9, 203.

(6) Johnson v. Kittredge, 17 Mass. 76.

(7) Holmes v. Drew, 7 Pick. 141.

(8) Avery v. Van Deusen, 5 Pick. 182.

ficiently certain, because, although requiring to be aided by parol proof, the facts are of a nature to be generally notorious.(1)

14. The statute above referred to does not authorize the overflowing of a highway. It did not contemplate any conflict between the proprietors of mills, and those who might represent and manage other public interests. Its object was, to prevent a multiplicity of suits by individuals. But, as no provision is made for indemnity to the public, no encroachment on the public rights was intended to be sanctioned.(2) (See sec. 18.)

15. It has been held, (and is now substantially enacted,) that whether or not a lower proprietor upon a stream may raise a dam, so as to obliterate and submerge a fall above, and thereby *prevent* the erection of a mill; yet, when the upper proprietor has actually built or is building a mill, a lower proprietor cannot, without a right acquired, by grant, prescription, or actual use, erect a new dam or raise an old one, so as to destroy the upper mill privilege, simply under a liability to pay damages, pursuant to the flowing acts.(3)

16. The statute in question applies only to *natural* streams, but does not justify the flowing of another person's lands by a *canal* or artificial stream. It was designed to provide for the case, where the absolute right of each proprietor to use his own land and water privileges at pleasure cannot be fully enjoyed, and one must of necessity in some degree yield to the other. Hence, where a sluice and gate, through which the water was drawn, which flooded the plaintiff's meadow, were not placed upon any natural stream, but upon a canal or artificial cut, by which the water flowed through the meadow where it did not flow before; the plaintiff was held entitled to bring an action at common law. Nor does a contract, by which the plaintiff authorized the defendant to make such canal, put it upon the footing of a natural stream, so as to bring it within the statute.(4)

17. The provisions of the Revised Statutes do not apply, where one merely erects a dam across a stream running through his land, unless he also erects, or intends forthwith to erect, a mill, in connection with such dam. And for any injury thereby caused, he is liable to an action at common law.(5)(a)

(1) *Com. v. Ellis*, 11 Mass. 462.

(2) *Com. v. Stevens*, 10 Pick. 247.

(3) *Bigelow v. Newell*, 10 Pick. 348.

(4) *Fiske v. Framingham, &c.*, 12 Pick. 68.

(5) *Fitch v. Stevens*, 4 Met. 426.

(a) Several recent cases have occurred, upon the question whether a *complaint* or an *action* is the proper remedy.

The verdict of a sheriff's jury having restricted a mill owner from keeping up his dam and flowing the land above certain months in the year, he is liable to the land owner, in an action at common law, for flowing the land during those months; although he causes such flowing through a canal cut by him, by the side of the stream, after the verdict, instead of causing the water to flow back in the natural stream, as it flowed before the verdict; though the flowing was not occasioned by the particular structure, which created the obstruction at the time of the trial by the sheriff's jury, and which the jury had in view in giving their verdict, but a different one; though the new channel, dug by the defendant, was of greater capacity, and would carry off the water more freely and fully from the plaintiff's land, than the old channel, and was kept open during the months specified in the verdict; and though since the verdict the defendant had added a large amount of machinery to his mills. *Hill v. Sayles*, 4 Cush. 549; 12 Met. 142.

If a mill owner erects a dam across the outlet of a pond which flows into the stream on which his mill stands, in order to create a reservoir for his mill; the owner of land flowed by means of the dam cannot maintain an action at common law therefor, but must proceed under the mill act. *Shaw v. Wells*, 5 Cush. 537.

18. In Maine, the statutory provisions as to flowing are substantially the same with those in Massachusetts, with the following exceptions. The only trial seems to be, as in ordinary cases, by a jury *in court*, and not by a new jury out of court, after a preliminary hearing upon the pleadings. The respondent may be required to give security, upon the filing of the complaint, for the damages; otherwise, he is liable to a suit at common law. The statutory remedy does not lie for a town against one who has flowed a town road. The only remedy is a special action on the case. (See sec. 14.) It seems, it does not lie for one who has only a private easement in the land, or for a tenant for years.(1)(a).

(1) 1 Smith, 194; Rev. St. 560-1-2. See 411; Preble v. Reed, 5, 169; Seidensparger v. Clement v. Durgin, 5 Greenl. 9; Axtell v. v. Spear, 5, 123; Calais v. Dyer, 7 Greenl. Coombs, 4, 322; Jones v. Pierce, 4 Shepl. 155.

It seems, when a cellar is flowed by water which is set back through the drain therefrom, by the raising of a mill-dam, the remedy, if any, of the owner of the cellar, is under the mill act, (Rev. Sts. c. 116,) and not by action at common law. Cotton v. Pocasset, &c., 13 Met. 429.

The remedy for a town, against a mill owner who overflows a road, which the town is by law obliged to repair, and does repair, is by an action on the case, and not by a complaint; and, in such action, the town is entitled to recover the expense incurred in repairing the road, with interest from demand, but not the costs of an indictment against the town. Andover v. Sutton, 12 Met. 182.

A mill owner placed a dam across the outlet of a pond, and thereby caused the water to overflow a road near the bank. The town, obliged by law to repair the road, repaired it, and caused a bank-wall to be built upon the shore of the pond, out of the line of the road, to stop the washing away of the bank, and to protect the road against the action of the water, which would otherwise have soon reached the boundary of the road. Held, in an action by the town against the mill owner, to recover the expense of repairing the road, the expense of building the wall might be recovered. *Ib.*

The following are the most recent miscellaneous decisions upon this subject in Massachusetts.

The parties to a complaint having agreed upon the appointment of surveyors, who were appointed accordingly by the court, to make surveys and experiments, to be used on the trial; and having also agreed, that the result, and the testimony of the surveyors, as to the effect of the dam and flash-boards of the respondent, should be the only evidence, to be used on the trial, upon that question in the case, unless fraud or mistake could be shown on the part of the surveyors; it seems, the only evidence, admissible to show such mistake, is that which relates to some error in the compass, or in figures, or in computation, or to some other like error, and not evidence going over the surveys and experiments, with a view to detect mistakes in the results. Richardson v. Curtis, 2 Cush. 341.

It seems, the laws of Massachusetts respecting flowage do not apply to the case of machinery, used by the United States for public purposes, in a place over which jurisdiction has been ceded to the United States; so as to authorize a mill owner to flow back, in a way to impair in any degree the use of the machinery. United States v. Ames, 1 W. & M. 76.

It seems, also, that those statutes were not intended to authorize the flowage back upon public lands of the United States. *Ib.*

(a) A complaint for flowage must allege an erection by the defendant on his own or another's land, by consent, and necessary to raise a head of water, whereby the land was flowed. Farrington v. Blish, 2 Shepl. 423.

In a complaint by one for flowing land claimed to be his, the title is to be considered in the complainant, if the defendant does not controvert it. Benson v. Soule, 32 Maine, 39.

Damages may be recovered for an injury to a mill lawfully existing, occasioned by the erection of any dam, if the right to maintain such mill has not been lost or defeated. Thomas v. Hill, 31 Maine, 252.

A judgment for yearly damages is a charge upon the estate on which the mills stand, and binds a subsequent owner and occupier of the mill. Knapp v. Clark, 30 Maine, 244.

The verdict of the jury may include compensation for injury done to the complainant's fences, and for the annual expense of maintaining fences for the future. Jones v. Phillips, 30 Maine, 455.

In Maine, in an action to recover the plaintiff's share of the rents and profits received by the defendant from a grist-mill, in which the parties and a third person were co-tenants, it is no defence to the whole or part of the claim, that the defendant has incurred expenses in repairing the mill, unless the repairs have been made in conformity with c. 86 of the Rev.

19. The statute in Maine, with regard to the *repair* of mills, is also substantially the same as in Massachusetts; with the further provision of 12 per cent. additional interest after six months from the making of the repairs. The party in possession is deemed proprietor of the mill, and a claim is given him against other parties in interest. The same provision as in Massachusetts as to *tolls*.(1)

20. In New Hampshire, the toll for *grinding* is fixed at 1-16; for *bolting*, 1-64. Where a mill, dam, or flume, is out of repair, one of several owners may make application to the selectmen of the town, who shall proceed to examine the premises, after notifying the other owners or occupants. After the examination, they shall also notify them to repair their portion of the mill, &c.; and if they fail to do so, the party making application may proceed to do it, and recover the value appraised by the selectmen, from the occupant, lessor or freeholder, if he is benefited by the repairs. The same provision applies, where a dam or flumes are owned in severalty, and a water privilege jointly. Parties having a qualified interest, as, *e. g.*, a mortgagor or wife, may contribute to the expenses, and shall have a lien on the property therefor. No decree shall be passed to rebuild a mill, &c., without consent of half the owners. The law gives a lien upon the property, but it does not impair the effect of any special contract.(2)(a)

21. In Rhode Island, the provisions in relation to flowage are similar to those in Massachusetts. The court, upon application, issue a warrant, in the first instance, for a jury to view the premises; and their verdict for the yearly damages, being returned and recorded, shall be a bar to any action, except an action of debt for the yearly damages assessed.(b) If joint owners of a mill have a controversy respecting it, and in consequence it has gone to ruin, one of them may, in presence of two freeholders, demand of the others to aid in repairing it, and, upon their refusal, may apply to the court, who may license the applicant to repair and use the mill, on condition of paying to the others such yearly rent as they may agree upon. If they do not agree, the parties not

(1) 1 Smith, 198-200.

(2) N. H. L. 186-7; Rev. St. 352-3; *Bel-
lows v. Dewey*, 9 N. H. 278.

Sts. As that statute (sec. 1) prescribes no time, within which notice of a meeting of the mill owners must be delivered to an owner, or left at his abode; it must be done in a reasonable time. It is sufficient to show, that at such meeting the owners in interest of one-half the mill determined to repair it. The statute does not require the choice of officers, and the action of the meeting need not be evidenced by any record or written evidence. In such action, the other tenant in common is a competent witness for the defendant, to prove the proceedings at such meeting. No owner can be charged against his consent for repairs not necessary to make the property serviceable, nor is the decision of the meeting, as to what is necessary, conclusive. But if, pursuing the statute, a part owner has gone beyond that limit, his lien on the mill for repairs to that extent is good, and he will be liable to his co-tenants only for the surplus of the profits in his hands, after reimbursing himself. *Buck v. Spofford*, 31 Maine, 34.

To establish the right of flowage, the defendant must show that the flowage continued twenty years, except during the rebuilding or repair of the dam, and was at least as high as in the three years next preceding the filing of the complaint; that such damage was every year done the complainant as he would have a remedy for by law; and that he knew, or had the means of knowing, of the flowage. *Wood v. Kelley*, 30 Maine, 47.

(a) If one owner calls upon another to repair, and he fails to do so, the former cannot erect a new and different mill, and require the latter to contribute to the expense. *Bellows v. Dewey*, 9 N. H. 278.

(b) Whether, under this act, a dam may be raised to the injury of a prior privilege or dam above; *qu?* *Mann v. Wilkinson*, 2 Sumn. 273.

repairing may apply for a jury to assess the rent. Such parties may also re-enter, in case of repairs as aforesaid, upon paying their share, unless agreed to the contrary. In the same State, every dam shall have a waste-gate, sufficient to vent as much water as naturally runs in the river, from June 26 to October 26; and, after the water has risen three feet perpendicular, on the flumes which convey the water to the water-wheel, the gate shall be kept open from 6 A. M. to 9 P. M., if desired by any mill owner, within one mile below; except when the upper mill is going, at which time the gate may be shut. No greater toll shall be taken than 1-16, under a penalty, and a liability to private damages, unless there is a particular contract. Millers shall grind well, and in turn. A complaint for flowage does not abate by the death of a party. If abated for informality, one year is allowed for a new process.(1)

22. In Connecticut, the toll of millers is fixed at three quarts for a bushel of Indian corn; for other grain, two; except malt, which is one. For bolting, one pint to the bushel. In the same State, the obstruction or diversion of a stream, to the prejudice of any person, without leave of the town, where the town has power to grant it, is a common nuisance; but the nuisance cannot be abated but by legal authority. The act does not apply to a dam by which no private damage is caused, nor where there has been a user for fifteen years. Any attempt to obstruct or divert the Connecticut river is a nuisance; but this is not to affect any vested right of wharfing, or the right to secure the lands of proprietors adjoining a river.(2)

23. In Vermont, millers are required to grind well. The tolls are fixed at 1-16, and 1-64, in addition, for bolting. For malted grain, 1-32. These provisions do not apply, where the grain is to be used for *distilling*.(3)

24. In Maryland, the toll for Indian corn, or rye, is 1-8. By an old statute, said to be now in force only in the counties of St. Mary's, Calvert, Charles and Dorchester, where a mill is built upon any *branch or run*, where the road crosses, with a dam, the latter shall be made twelve feet wide at the top, and a bridge over the *waste* and *race*. If a mill obstructs the road, and the court think it advisable that the road pass below the dam, or if a road already pass below such dam, the owner of the mill, &c., shall make a causeway across the branch, 12 feet wide, and a bridge over the tail of the mill. Where a road passes a mill-dam, the latter shall be fenced. The owner of any mill, &c., within 500 yards of a railroad, may apply for the laying out of a public or private road, or a railroad.(4)

25. In Pennsylvania, the owner of land upon any navigable stream, declared by law a public highway, except the Delaware, Lehigh and Schuylkill rivers, may erect a mill or other water works, and use the water therefor, not obstructing navigation or the passage of fish, under a heavy penalty, and not injuring the owner of any private property upon the stream. A summary process is provided, for compensation to any person who is obstructed by a dam in navigating any sort of vessel.(5)

26. In Delaware, tolls are fixed at 1-10 for wheat, rye, Indian corn,

(1) R. I. L. 374-5-6-7; St. 1840, 1099.

(2) Con. St. 412; Ib. 417-18.

(3) Vt. L. 476; Ib. 1832, 23.

(4) Md. L. 1816, ch. 76; Ib. 1753, ch. 16 and n.; Ib. 1834, ch. 64; 1836, ch. 255.

(5) Purd. Dig. 645-6.

buckwheat, and malt, in Newcastle county; in Kent and Sussex, 1-10 for wheat and malt, 1-8 for corn, rye, and buckwheat. Where a mill owner is injured by any mill-race, dam or pond, he may present a petition to the court, who shall appoint a jury to view the premises and assess damages, for which execution shall issue, or, if the jury are of opinion that the work ought to be removed, the court shall so order. Application must be made within six years from the damage incurred, or one year, in case of disability, from its removal. Where a mill owner wilfully or accidentally discharges from his dam an unusual quantity of water, he shall as soon as possible give notice to the owner or occupant of a mill next below.(1) Where a road is injured by the erection of a mill, race, &c., the owner must repair it. Where there is a race or water-course through the road, or a dam over which it passes, or a pond, the owner shall make a bridge or way, twelve feet wide, and fence it; unless the road is laid out subsequently to the erection of the mill. He shall also take measures to conceal the wheel from the road. Any expenses, incurred by a tenant in these particulars, he may deduct from the rent. Where one mill is injured by another below, the damage shall be assessed by a sheriff's jury. If the owner of an upper mill discharge an unusual quantity of water without notice, he may be liable to double damages occasioned thereby.(2)(a)

27. In New Jersey, similar provisions to those of the last statute cited in Delaware are adopted.(3) The tolls are 1-10 of grain, including belting, and of malt, one quart from a bushel.(4)

28. In North Carolina, every water grist-mill or wind-mill, which grinds for toll, is a *public* mill. Where a person owning land upon only one side of a *run* wishes to erect such mill, he may petition the county court, who shall notify the opposite owner, and cause to be laid off an acre of land on each side, by commissioners, whose report, containing their opinion upon the subject, shall be recorded. If it can be done without taking away houses, orchards, gardens, or other immediate conveniences, the petitioner may have leave to erect a mill, paying the valuation money for the acre of land, and procuring a record thereof, which shall give him a title in fee-simple. Where a grist-mill has been erected by order of court, the court shall not grant any part of the tract on which it stands for another mill, within two miles of the former. Nor shall a mill be authorized, which will overflow another mill, or create a nuisance to the neighborhood. Unless the person authorized to build a mill begin it within one year, and complete it within three years, and keep it for public use, or unless the time be enlarged by the court, the land reverts to the former owner, or his representative. If a water mill, owned by a person under disability, be let fall, burnt or destroyed, three years after removal thereof are allowed for rebuilding. Millers shall grind well, if the water permit, and ac-

(1) Del. L. 402-4-5-6.

(2) Del. L. 466-7; Rev. Sts. 178, 180.

(3) 1 N. J. L. 622-3.

(4) Ib. 446.

(a) The act of 1773, in Delaware, for the encouragement of mill owners, and giving them a summary remedy for damages occasioned by the erection of other dams, has reference to the location of new mill seats, and does not apply to a change in the construction of dams already erected. *Garrett v. Bailey*, 4 Harring. 197.

cording to turn, and take for toll only 1-8 of Indian corn and wheat, and 1-14 for chopping grain, under penalties. Any person, injured by the erection of a mill, may petition the court, who shall order a jury to inquire as to the amount of damage sustained. The jury shall meet on the premises, and give in their verdict for an annual compensation to the petitioner, which shall be binding for five years, unless the water should be raised, or the damage otherwise increased. If the damage is as high as \$20, he may sue in common form, and the verdict on petition shall then be binding only for the preceding year's damage.(a) If the verdict is in favor of the petitioner, execution issues for one year's damages, and a new execution may be had each successive year for five years.(1)

29. In the same State, every owner of a water-mill upon the highway shall keep in order all bridges attached to his dam, over which the road runs, unless the road was laid off after the mill was built, and not on his application.(2)

30. In South Carolina, every person, who keeps water during the winter upon grounds on which rice is planted in the following spring, shall, on the tenth day of March, open the dams by which the water is kept up, so as to let it off. If he fail to do so, any person injured may apply to a magistrate for a warrant of survey, to be issued to three freeholders, who, if they are of opinion that the obstruction will prevent a seasonable planting of the crop, may cause it to be immediately opened or removed. But this shall not be done, where drains have been made, through which the water will flow off as speedily as it would by the natural course, if unobstructed. Any person, between March 10 and November 1, ensuing, may thus apply for a warrant of survey, on any obstructions which impede the conveying off any surplus water on his or her rice grounds, and which by remaining thereon may prove injurious, or shall at any time make or keep up a dam, by which the lands of another are flowed to his injury; in either case the magistrate and freeholders may proceed as above provided.(b) Where a dam is made for the purpose of forming a reservoir, it shall be pro-

(1) 1 N. C. Rev. St. 420-4. (See 2 Dev. Eq. 38; Mumford v. Terry, 2 Car. 425; Purcell v. McCallum, 1 Dev. & Bat. 221; Gillet v. Jones, Ib. 339.)

(2) Ib. 543-200. See Bridges v. Purcell, 1 Ired. 232.

(a) A party is not bound to wait for a year after an injury, before he can institute his proceedings. Cockran v. Wood, 6 Iredell, 194.

Damages are first to be sought by petition for annual damages, to the county or Superior Court, before an action on the case will lie. King v. Shuford, 10 Ired. 100.

Possession of the flowed premises is sufficient to support the petition. Pace v. Freeman, 10 Ired. 103.

It is not necessary that a copy of the petition should be served on the defendant. Ten days' notice, in writing, of an intention to file it, is sufficient. Cox v. Baie, 12 Ired. 139.

Under the act of 1809, the owner of land flowed has a right of action, only after the damage has been ascertained by a jury to be equal to \$20 a year, and the verdict so obtained is good for five years, but no longer, without a new ascertainment of damages. Gilliam v. Canaday, 11 Ired. 106.

The verdict and judgment are conclusive as to the assessment of damages, up to the time when such judgment was rendered. Beatty v. Conner, 12 Ired. 341.

An application for relief from damages, assessed for a period subsequent to the judgment, can only be heard, if the dam is taken away or lowered. The washing out of the channel, and other causes of a similar kind, furnish no reason for abating the damages. Ib.

(b) This section of the statute is obscure; but I have given the words of it substantially.

vided with a sufficient *waste-way*, and so made as to sustain the weight of water against it. The same process is provided for the examination of dams in this particular, which has already been referred to in case of the flowing of rice grounds (1)(a)

31. In Virginia, where a person owns lands on one side of a stream, the bed of which belongs to him or to the State, or on one side of a stream, the centre of which divides his land from another's, but does not own in fee the opposite lands, and desires to build a water grist-mill or other machine or engine of public utility, and to abut a dam upon the opposite shore; he may obtain from the court a writ *ad quod damnum*, upon which a jury shall be summoned to view the premises. The jury proceed to locate and circumscribe, and to appraise, an acre of land; also to appraise the damage which will arise from overflowing the lands of others; to inquire whether any mansion-house, &c., (as in sec. 28,) will be flowed, or fish and navigation obstructed; how such obstruction may be prevented; and whether the health of the neighbors will be injured. Upon return of the inquest, a summons to show cause issues to all parties interested. The same course is provided, where one owns on both sides; or where, owning on one side, the bed of the stream belonging to the State, he wishes to erect a mill, &c., or abut a dam upon a rock or island therein, or otherwise to extend a dam only in part across. Where none of the injuries above named are likely to ensue, the court may authorize the erection of the mill, &c., providing against the obstruction of fish, navigation, and the crossing of the stream. Upon payment of the damages, and the value of the land, the applicant acquires a title to the latter, subject, however, to reversion in the former owner, if he does not begin to build, or in case of its destruction to rebuild, the mill in one year, and to complete it in three years. In case of disability, three years are allowed from its removal. The rights of reversioners, &c., are also saved. Where a tenant for life, or for years, of a mill, &c., (except those erected by himself,) which becomes destroyed or unfit for use, fails to repair it in the time above specified; the reversioner, &c., may enter and repair, and hold it for his own use, within three years of such neglect of the particular tenant, or from the removal of any disability. An owner may obtain authority to *raise* his dam, by suing out a second writ *ad quod damnum*, to appraise the additional damage. An inquest is no bar to a public prosecution, or private action, for any injury not actually foreseen and estimated. No toll shall be taken for grinding at any mill (built since 1819) unless established according to law, by order of court. Millers shall well, and in turn, grind grain brought by any persons for the usual consumption of themselves and their families; taking for toll 1-8 of that ground into meal, and 1-16 of that ground into hominy or malt. Every owner or occupant of a mill may grind, at any time, his own grain; and no one shall be obliged to run more than one pair of

(1) 3 Brev. Dig. 115-16-17.

(a) Whenever a party obstructs the passage of water which would naturally flow through his land, so as to cause it to overflow the land of another, he is liable to have his dam cut, or to pay a penalty, or to suffer both, as the case may be, unless he affords a sufficient drain, or drains, through his own land, to carry off the water passing through, in as expeditious a manner as it would have passed through the natural course, or channel. *Brisbane v. O'Neill*, 3 Strobb. 348.

stones. Where a road passes over any dam, the owner or occupant shall keep the dam in repair, twelve feet wide at the top, and a bridge of the same width, with rails, over the pier-head, flood-gates, or any waste cut through or round the dam, and over any race or canal leading to or from the mill or pond, over which a road passes.(1)

32. When leave is granted to cut a canal through the lands of another person, the court may impose such conditions as it shall think proper, and shall reserve leave to the owner of the land to erect fencing and bridges and water-gates, not obstructing the passage of water to the mill, &c. And the party making the canal shall acquire a title in fee, subject to these reservations. But this act is not to impair the public right of navigation.(2)(a)

33. In Kentucky, the provisions of the Virginia Revised Code are re-enacted. They extend to any kind of water-works. Where a mill is applied for, any one liable to injury may become a party respondent. The bed of the stream must belong either to the applicant or the commonwealth.(3)

34. In Mississippi, also, the provisions of the Revised Code of Virginia seem to be, for the most part, literally copied. It is, however, provided, that no person shall take toll for grinding at a mill not established by court, unless the lands on which the mill stands, and which the dam renders unfit for cultivation, belong on both sides to the builder. Also, that the toll for hominy or malt shall be 1-12.(4)

35. In construction of the Virginia and Kentucky statutes, it is held, that the execution and return of a writ *ad quod damnum* divest the title to the land from the former owner, and vest it in the commonwealth.

(1) 2 Vir. Rev. C. 225-302. See Code, 328. | Campbell, 7 Dana, 204. See Trabue v. Mack-

(2) Vir. L. 1833-4, 96.

lin, 4 B. Monr. 409.

(3) 2 Ky. Rev. L. 1212-19; Wootten v. | (4) Mississippi Rev. C. 336-41.

(a) This act is entitled "to amend an act, entitled an act to reduce into one act the several acts concerning mills," &c., passed March 2, 1826. The act of 1826, I have unfortunately been unable to procure.

On an application for leave to erect a mill or other machine, the petitioner must show that he has proceeded in the mode prescribed by law to suit his particular case. Whitworth v. Puckett, 2 Gratt. 528.

If the party applying owns the land on only one side of the stream, the proceeding should be under the 1st, 2d, and 3d sections of the act (2 Rev. Code, c. 225;) and if in such case he proceeds under the 4th section, the court should quash the writ and inquisition. Ib.

If it appears upon the hearing of the case before the court, that a greater quantity of the land of the adjoining proprietors will be overflowed than the jury estimated, the inquisition should be quashed, and a new writ directed to issue. Ib.

The court has no authority to increase or diminish the damages to the adjoining proprietors, assessed by the jury. Ib.

The applicant for leave to build a mill or other machine, is not entitled to the ownership of the land overflowed by the erection of the dam, upon paying the damages assessed by the jury. Ib.

The 9th section of the act passed February 23, 1835, respecting the upper Appomattox Co., embraces the case of a proprietor whose land is injured by the erection of a dam across the river, where no writ of *ad quod damnum* had been sued out by the company, they having agreed with the proprietors of the lands owning the abutments. Nash v. Upper Appomattox Co., 5 Gratt. 332.

Where a writ of *ad quod damnum* is sued out by the proprietor of lands injured by the erection of a dam, it is not necessary, either in the writ or inquest, that the land should be set out by metes and bounds; and the finding, in the inquest, that the proprietor's lands had been injured by the overflowing of the waters of the river, produced by the erection of the dam, and that damages assessed were on that account, is sufficiently specific. Ib.

Where there had been no previous writ of *ad quod damnum*, to assess the damages; held, the writ should direct the jury to inquire of and assess the damages sustained by him, generally, and not limit it to damages which had not been foreseen, estimated, and satisfied. Ib.

A grant, regularly obtained, to erect a dam and mill, vests in the grantee so much of the public right to the stream, as is necessary to the full enjoyment of the mill. Upon an application to *raise* a dam, only the damages thereby caused shall be inquired into; and not prior damages, though not considered by the original jury. Upon such application, a new inquest is necessary, as to the health of neighbors, overflowing orchards, &c. The inquest, in these proceedings, must state whether the health of neighbors will be endangered, and should also state whether fish will be obstructed. If it states the former point *probably*, this is conclusive against the petition.(1)

36. In Alabama, every water grist-mill, which grinds for toll, and every steam or horse toll-mill, is a *public mill*. No one shall erect a mill, to overflow another mill, or create a nuisance to the neighborhood. Where one owns in fee on both sides of a stream, or only on one side; (a) or where he has lands adjoining others, through which a ditch or canal is necessary for a mill, or other water-works, upon his own lands, he may apply to the clerk of the county court for a writ *ad quod damnum*, upon which seven landholders shall be summoned to view the land, and lay off and appraise an acre; to examine neighboring lands which may be overflowed, and estimate the damage, and inquire whether the mansion-house, offices, curtilages, gardens, or orchards, will be overflowed, or the health of the neighbors injured, in which case leave will not be granted to build a mill; and, in case of a ditch or canal, to assess the damage to the land owner. After this inquest, notice to show cause is given to the proprietors of lands. On payment of the value of the land and damages, the party becomes seized of the acre of land, and so much as is necessary for the ditch or canal. (The same provisions, as to the time of building or rebuilding the mill, as in Virginia and North Carolina.) For the purpose of *raising* a dam, a second writ *ad quod damnum* lies. Every miller shall grind well, and in turn, if possible, for the toll of 1-8. He may at any time grind his own grain.(2)

37. In Georgia, a miller shall well grind all clean and dry grain, in turn, as far as five bushels, for the toll of 1-8—except in time of drought, or for other good reason of excuse. He may at any time grind his own grain.(3)

38. In Ohio, the Canal Commissioners are authorized to sell or lease the surplus waters connected with or arising from any public canal; such sale or lease not to interfere with individual rights. They may also dispose of any surplus lands owned by the State, in connection with such canals. But such disposition shall always contain a reservation, or condition, that the State may resume the privilege of the water, when the purposes of navigation so require. And, in case of such re-

(1) Att'y, &c. v. Turpin, 3 Hen. & M. 548; 3 Rand. 33; 1 Litt. 92; 2 Bibb. 2; Wilkin-
Crenshaw v. Slate, &c., 6 Rand. 245; Eppes
v. Cralle, 1 Munf. 258; Knowsler v. Ward,
Gilm. 127; Mountjoy v. Oldham, 1 Marsh.
535; Anthony v. Lawhorne, 1 Leigh, 4;
Mayo v. Turner, 1 Munf. 405. See, also,
Young v. Price, 2 Munf. 534; Dawson v.
Moons, 4, 535; Richards v. Hoome, 2 Wash.
36; Wroe v. Harris, Ib. 126; Mead v. Haynes,

3 Rand. 33; 1 Litt. 92; 2 Bibb. 2; Wilkin-
son v. Mayo, 3 H. & Mun. 565; Coleman v.
Moody, 4, 1; 4 Bibb, 464.

(2) Aik. Dig. 324-5; Clay, 378. See Hen-
drick v. Johnson, 5 Por. 208; Rosser v. Ran-
dolph, 7, 238; Macon v. Owen, 3 Alab. (N.
S.) 116.

(3) Prince, 610.

(a) It has been held, that the statute does not affect one's right to erect a mill upon his own land; this stands as at common law. Rosser v. Randolph, 7 Por. 238.

sumption, the consideration, or rent, or a proportional part thereof, shall be refunded, or remitted.(1)

39. In Tennessee, the provisions for the erection of mills are the same as in North Carolina. The tolls are of 1-6 of Indian corn, and 1-8 of wheat, in Edenton, Newbern, Wilmington and Halifax districts, and 1-8 of both, in Hillsborough and Salisbury; and 1-14 for chopping. The obstruction of navigation is also prohibited. Many local acts have been passed for the encouragement of mills.(2)

40. In Michigan, the general proceedings, in case of flowage, are the same as in Massachusetts. Yearly damages are assessed, for which security may be required, on filing the complaint, or bringing an action of debt for damages, already assessed. The jury also return what portion of the lands ought not to be flowed. Similar provisions are also made for the repair of mills belonging to joint owners. The tolls for grinding, in wind, water, or steam mills, are 1-10 of grain, ground and bolted, 1-12 of that not bolted, and 1-8 of corn. In mills moved by animal power, 1-8, when the miller does not find the team, or 1-4 when he does find it. Millers shall well grind, and in turn.(3)

41. In Missouri, all grist-mills which grind for toll are *public mills*. Water-mills are required to grind at least four days in the week, well, and in turn. But the owners of ox, horse, or steam mills, may always grind their own grain. The tolls are, for a water or steam mill, 1-8; a horse or ox mill, 1-5, when the miller finds the team; when he does not, 1-8. The provisions for erecting mills are substantially the same as in Virginia, Kentucky, &c. So also in Illinois.(4)

42. In Indiana, where an owner on one or both sides of a stream wishes to build a mill, or where he has already built one, and a neighboring owner claims damages; either may have a writ *ad quod damnum*, to settle the amount of injury.(5) The proceedings are similar to those in Virginia, &c.(a)

43. In Arkansas, one who wishes to erect a mill makes application to the court, who issue a writ *ad quod damnum*, for inquiry into the

(1) Ohio St. 378-80.

(2) 1 Scott, 219-20, 2, 518.

(3) Mich. L. 470-4.

(4) Misso. St. 404-8; Illin. Rev. L. 449.

(5) Ind. Rev. L. 65.

(a) The jury are bound to adjudge, whether the stagnation of the water will injure the health of the neighborhood. *Gherkey v. Haines*, 4 Blackf. 160.

The petition, the writ, and the inquest, or at least the latter, should name all the proprietors of lands, both above and below the site of the dam, who may be or have been in any way injured by the dam. *Honenstine v. Vaughan*, 7 Blackf. 520.

If an assessment of damages be too high or too low, the circuit court may set it aside, and order another assessment. *Chapman v. Groves*, 8 Blackf. 308.

On such writ, issued after the dam was built, damages were assessed, and not objected to; the court gave judgment on the assessment, and ordered that, on payment of the damages and costs, the petitioner should "have leave to continue his dam, and to flow said lands as they were flowed by said dam at the time of said inquest." Held, this order could not be complained of by the petitioner. *Ib.*

An assessment of damages under a writ of *ad quod damnum* may be objected to by the defendant, on the ground that the damages are insufficient; and the question as to the validity of the objection will be for the court. *Peck v. Van Rensselaer*, 8 Blackf. 312.

Such writ was issued, in a case where the petitioner's mill dam, previously built, caused land of the defendant to be overflowed. The inquest was favorable to a continuance of the dam, and gave the defendant damages for the injury to his land. The plea was a decree in Chancery in the defendant's favor, enjoining the petitioner forever from causing, by his dam, the overflowing of defendant's premises. Held, that the plea was insufficient. *Ib.*

amount of damage that will be caused by the flowage, whether it will reach any mansion-house, garden, &c., as to the effect upon fishing, navigation and health, and the value of an acre of land on the opposite shore, (the applicant owning on one side only.) If a mansion, &c., will be overflowed, or the health of the neighborhood affected, the application will not be granted; otherwise, a decree may be passed, vesting a title to the opposite land in the applicant, under condition of payment of the price, providing for passage of the fish, commencement of the erection in one, and its completion in three years. If not complied with, the land reverts. The same provisions apply to the raising of a dam. The proceedings are no bar to an action for injuries not estimated. In case of obstructing a stream without license, and a consequent flowing, double damages may be recovered, as for a nuisance. Upon failure to comply with the conditions, other parties may build. The provisions extend to canals running from lakes.(1)(a)

CHAPTER LXXIII.

FISHERY.

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|---|---|
| 1. General division of the subject. | 29. Fishery in the sea and navigable streams. |
| 2. Kinds of fishery—common of piscary; free and several fishery; common and exclusive rights. | 32. Modifications of the common law in the United States—regulation of rivers not navigable—doctrine in Pennsylvania, &c. |
| 16. Construction of grants. | 54. Right of fishery, whether it gives a right to enter on private lands. |
| 19. Fishery in river not navigable, who entitled to. | 58. Statutory provisions. |
| 22. Qualification of the right; passage of the fish; passage-ways through dams, &c. | |

1. *Fishery* is another important subject connected with water-courses. In some cases, the right of fishery is a *franchise*, and might, therefore, properly be considered under the head of Franchises. It is also sometimes classed with *rights of common*. But the present connection seems to be, on the whole, the one in which the subject may be most appropriately treated.

2. In Pennsylvania, it is said, fishery is a species of property, relating to which there are few decisions. Fisheries for shad and herring have, however, existed from a very early period; and there are very

(1) Ark. Rev. St. 572-5.

(a) The statute of Iowa, making it a penal offence to injure a mill dam, is cumulative, and does not take away the common law right to abate a nuisance. *The State v. Moffett*, 1 Iowa, (Greene,) 247.

An act of the legislature, authorizing A to build a dam, does not take away the right of B to abate it as a nuisance, if it causes the water to flow back upon B to his serious disadvantage. *Ib.*

To come within the statute, making it a penal offence to injure a mill dam, the injury must have been wilful and malicious; and the necessary abatement of a nuisance created by such dam, by one's own act, is not necessarily so. *Ib.*

early acts regulating and restraining, though not expressly creating them. These acts seem to apply to shad; or, in the Delaware, perhaps, shad and herring. The term *fishery*, seems to be exclusively applied to the place of drawing a seine, or net, for shad or herring; or a right thus to take these fish in a certain part of a river.(1)

3. *Common of piscary* is a liberty, or right of fishery, in the water covering the soil of another person, or in a river running through another man's land.(2)

4. A *free fishery* is said to be a franchise in the hands of a subject, existing by grant or prescription, distinct from an ownership in the soil. It is an exclusive right, and applies to a public navigable river without any right in the soil.(3)

5. A *several fishery* is a private exclusive right of fishery in a navigable river, or arm of the sea, accompanied with the ownership of the soil. It is a grant along with the soil, though the soil may be granted without it; and it has been strongly maintained, that such fishery may exist, without ownership of the soil. It has been held in recent cases, that the owner of a several fishery is *prima facie*, but not necessarily, owner of the soil.(4)

6. The distinctions between common of piscary, free fishery, and several fishery, are said to be quite unsettled.(5) Blackstone says,(6) a free fishery is an exclusive right. But Lord Mansfield said,(7) there was no free fishery, unless more persons than one had a co-extensive right in the same subject. So in Massachusetts,(8) it is held that a free fishery is not an exclusive fishery. A distinction has been made(9) between a *common fishery*, which may mean for all mankind, as in the sea, and a *common of fishery*, which is a right in common with certain other persons, in a particular stream. Chancellor Kent comes to the conclusion,(10) that the most easy and intelligible division is, into a right common to all, and a right exclusively in one or a few individuals.

7. In the case of *Melvin v. Whiting*,(11) Parker, Ch. J., gives the following account of the course of opinions upon this subject.

8. Blackstone gives the quality of exclusiveness to a free fishery, making it differ from a several fishery only in this; that in the latter the owner must, while in the former he need not, own the soil of the stream. In *Smith v. Kemp*,(12) two judges held that *libera piscaria* imported an exclusive right; and one, that it meant only *common of piscary*, according to Lord Coke.(13) The doctrine of Coke seems to be fully recognized in *Seymour v. Ld. Courtenay*,(14) and Hargrave also approves it.(15) Upon these grounds it is adopted in Massachusetts, and

(1) *Hart v. Hill*, 1 Whart. 131-2.

(2) 3 Kent, 403-9.

(3) *Ib.* 409.

(4) Ang. on W. C. 6-10; Com. Dig. *Prerogative*, D. 50; Davies, 149; *Smith v. Kemp*, 2 Salk. 637; *Carter v. Murcott*, 4 Burr. 2162; *Duke, &c. v. Fogwell*, 5 Barn. & Cr. 875; *Partheriche v. Mason*, 2 Chit. R. 658.

(5) 3 Kent, 409.

(6) 2 Comm. 39, 40.

(7) *Seymour v. Courtenay*, 5 Burr. 2814.

(8) *Melvin v. Whiting*, 7 Pick. 79.

(9) *Bennett v. Coster*, 8 Taun. 183.

(10) 3 Kent, 410.

(11) 7 Pick. 79.

(12) 2 Salk. 637.

(13) Co. Lit. 122. =

(14) 5 Burr. 2814.

(15) Co. Lit. 122 a, n. 181.

is also said to agree with the popular sense of a *free fishery* in this country, which has probably been derived from early legislation.(a)

9. In a late English case, it is said that the owner of a several fishery, in ordinary cases, and where the terms of the grant are unknown, may be presumed to be the owner of the soil.(1)

10. In Pennsylvania, Huston, J., says, instead of going into the black letter books, to learn what was a fishery, and a free fishery, and a several fishery, I am disposed to regard our own acts, even though differing from old opinions in feudal times. In Maryland, uninterrupted use of a fishery in a navigable river, for over twenty years, raises no presumption of the grant of a several fishery. It certainly does not, unless exclusive.(2)

11. A custom to take fish in another's fishery is not a lawful custom.(3)

12. The right to a fishery does not, *per se*, imply a fee-simple in the space between high and low water, opposite the fishery, but only such an interest as is necessary to the use of the fishery. Hence, the devise of "my fishing place," passes only the last named interest.(4)

13. Where a bay, or arm of the sea, is a common fishery to all the inhabitants of the town where it lies, and an individual inhabitant, having taken oysters therein, plants them in a bed in such bay, clearly designated and marked out; he may have an action against any one who interferes with them. So oysters, planted by an individual in a bed, clearly designated and marked out in navigable waters, which are free for all the inhabitants of the State, are the property of the person planting them, and he may maintain trespass against another for removing them, notwithstanding the latter has deposited other oysters in the same place, with the knowledge that the plaintiff had, at the time, similar property there, and with an intent so to mingle the two kinds together, that neither could be identified. It would probably be otherwise, if the bed interfered with the common fishery, or if the oysters were undistinguished from others in the bay.(5)

14. Clearing out a fishing place in a river, by one not owning the bank, does not give an exclusive right of fishery.(6)

15. The annual temporary use of a fishing privilege cannot be a disseizin.(7)

16. The grant, by patent, of an island commonly called and known by the name of Green Flats, is good, though the place is sometimes covered by water; but it is a grant, not of a fishery, but only of the land, subject to be used as a highway, and a public fishery, till otherwise appropriated by the grantee. It seems, no action lies for taking fish upon the island. But the public fishery does not give the right of drawing nets upon the Flats. A grant of the exclusive privilege of

(1) *Somerset v. Fogwell*, 5 Barn. & Cr. 875.

(2) *Hart v. Hill*, 1 Whart. 132; *Delaware, &c. v. Stump*, 8 Gill & J. 479.

(3) *Waters v. Lilly*, 4 Pick. 145.

(4) *Hart v. Hill*, 1 Whart. 137.

(5) *Fleet v. Hegeman*, 14 Wend. 42; *Decker v. Fisher*, 4 Barb. 592.

(6) *Westfall v. Van Anker*, 12 John. 425.

(7) *Nickerson v. Brackets*, 10 Mass. 217.

(a) Where a private river runs through a manor, each owner of the bank is presumed to own the fishery opposite his own land; and, if the lord of the manor claims a several fishery, the burden of proof is on him to establish it. *Lamb v. Newbiggin*, 1 Carr. & K. 549.

fishing on the Flats for ten years, is not a lease of the fishery, but of the right of drawing nets upon them, this being the purpose for which they had been used, and in the power of the lessor to grant; but the fishery on the Flats still continues common.(1)

17. Where a town is empowered by statute to sell the right of taking fish within its limits, under certain regulations, the act may be considered as granting a *free fishery*, which is a franchise that may be assigned or released.(2)

18. The Commonwealth, in a grant of land, included the right of taking fish, to be held in common among the grantees and other settlers. The occupants of the land, having become a town, were empowered by law to appoint a committee to regulate the fishery within the town; and a penalty was imposed for taking fish without their authority. Held, an owner of land adjoining the river was subject to the penalty, though before the grant he and those under whom he claimed had used to take fish there.(3)

19. At common law, the right of fishery in a fresh water river, above the ebbing and flowing of the tide, belongs to the owner or owners of the banks. If different persons own the opposite banks, each is entitled to the fishery on his own side to the thread of the river—*ad filum medium aquæ*. If both banks belong to one individual, he owns the whole fishery. A river of this description is in law said to be *not navigable*. And the fact that it is actually susceptible of navigation, even by large vessels, makes no other difference in the rule above stated, than that the fishery cannot be used to the obstruction of such navigation.(4)

20. By the principles of the common law, a town has no right of property in a fishery within its limits.(5)

21. The flowing of the waters of a lake into a river, and the re-flowing thereof, being not the flux and reflux of the tides, but only occasional and rare instances of a swell in the lake, and a setting up of the waters into the river, and the subsiding of such swells; do not constitute the river technically *navigable*, so as to give a public right of fishery.(6)

22. The common law right of fishery in fresh water rivers is subject to a reasonable qualification, in order to protect the rights of others, who, in virtue of owning the soil, have the same right, but might lose all advantage from it, if the owners below might impede the passage of fish into the lakes or ponds, where they by instinct prepare for the multiplication of the species. The principle is the same, as that which qualifies the private ownership of the stream itself, by the public easement of passage upon it. But, in Massachusetts, the common law upon this subject has been essentially altered by colonial, provincial, and later statutes; and the rights of the citizens are governed by the latter, and not by the former. The Prov. St. 8 Anne, ch. 3, prohibited the obstruction of fish by placing across a stream any fixed implement or machine; and St. 15 Geo. II, c. 6, required the keeping open in dams, for a certain period, sluice ways, or passages for the fish to pass

(1) Brink v. Richtmyer, 14 John. 255.

(2) Watertown v. White, 13 Mass. 477.

(3) Nickerson v. Brackett, 10 Mass. 212.

(4) Waters v. Lilly, 4 Pick. 145; 3 Kent, 410-11; Weld v. Hornby, 7 E. 195; Com. v.

Chapin, 5 Pick. 199; Smith v. Miller, 5 Mas. 191.

(5) Randolph v. Braintree, 4 Mass. 317.

(6) Hooker v. Cummings, 20 John. 98.

through. These acts assert the right of the public to regulate the mode of taking fish, even in private or several fisheries; and they also impliedly recognize the private right of erecting dams and other works, if a passage is left open at the time prescribed.(1)

23. Every owner of a water mill or dam holds it on the condition, or perhaps the limitation, that a passage way for fish be allowed. And this limitation is not extinguished by any neglect to enforce it, because no laches can be imputed to the government.

24. In 1633, the town of Dorchester made a grant in these words; "It is generally agreed that A shall build a water mill if he see cause." Then followed a grant to him of a *wear* adjoining his mill; and no person is to cross the wear with a net or otherwise, to the prejudice of said wear. It was further provided, that A should sell the fish at certain rates. In 1634, the legislature confirmed the grant to A and his heirs. Held, the grant gave A the franchise of a several fishery at that place, but nowhere above it; and that it did not authorize him to exclude fish from passing above the wear, because the value of the fishery would be much diminished by preventing the fish from casting their spawn in the ponds above, and the interest of the public, provided for by the grant, would be thus sacrificed.(2)(a)

25. The provincial statute of 8 Anne, ch. 3, to prevent nuisances by hedges and other incumbrances, obstructing the passage of fish, is still in force in Massachusetts.(b) The act contemplates only permanent erections, and such as may be removed by the sheriff. It does not apply to the setting of a seine to catch fish.(3)

26. In Massachusetts, a dam across a river not navigable is not subject to indictment at common law as a nuisance, for obstructing the passage of fish; but can be complained of only by the statutory remedies.(4)

27. Where a statute imposes a penalty upon any one who shall *place or set* any seine or net across a certain river, which shall obstruct the passage of fish; a seine, having one end of it attached to a boat, which is made fast to a stake on one side of the river, and having at the other end a rope, which is passed round a stake on the other side of the river, and is held by men, and drawn or slackened at pleasure, comes within the terms of the act. So, the repairing of an old wear with bricks, bushes and stakes, is a *setting*.(5)

28. Where one, having a sole and several fishery in a small fresh water stream, converted a *brush wear*, through which some of the fish might and did escape, into a solid *stone wear*, which was wholly imperious; the latter was held to be a nuisance.(6)

(1) Com. v. Chapin, 5 Pick. 202-3-4.

(2) Stoughton v. Baker, 4 Mass. 522.

(3) Com. v. Ruggles, 10 Mass. 391.

(4) Com. v. Chapin, 5 Pick. 199.

(5) Watertown v. Draper, 4 Pick. 165;

Atwood v. Caswell, 19 Pick. 493.

(6) Weld v. Hornby, 7 E. 194.

(a) A wear, appurtenant to a fishery, whereby a navigable river is obstructed, is legal, if granted by the crown before the reign of Edw. I. Such grant may be inferred from its existence. If at first it obstructed a part of the bed, and afterwards, by reason of a change in the bed, the whole, the right still continues. But, if the crown had no right to obstruct the whole, it is unlawful to make a wear obstructing a part, except subject to the public right. In this case, therefore, an obstruction of the whole, arising from the change above stated, is unlawful. Williams v. Wilcox, 8 Ad. & Ell. 314.

(b) Whether since the Revised Statutes; *quæ?*

29. The right of fishing in the sea, in its bays or arms, and in navigable or tide waters, is a common right, unless an individual can make an exclusive claim by grant or prescription. The latter must be clearly proved—every presumption is against it. And a grant by the crown will be construed strictly, being so much taken from a common privilege.(a) The right above mentioned is by some writers considered to rest upon the law of nations. By the civil law, all rivers where the flow of water was perennial, belonged wholly to the public, including the fishery, and the use of the banks. Bracton adopted this doctrine in its full extent, and held that the right of fishing and using the banks was common, *jure gentium*. But it is everywhere agreed, that this right is subject to be modified and controlled by the municipal law; and a late case has decided, that the public have no right of crossing the beach or sea-shore for bathing, as against the lord of a manor, who owns the soil of the shore, and the exclusive fishery.(1)(b)

30. In England, the king may grant fishing within a creek of the sea, or within some known precinct of known bounds, even within the main sea. The 16th chapter of Magna Charta, though restricting the king as to the occupancy of rivers for his pleasure, did not restrict him from granting the lands under rivers and navigable waters.(2)

31. Clauses in the royal grant to the English colonies, reserved to all English subjects, including the colonies, a right to fish in arms of the sea, and salt water rivers, "where they have been wont to fish;" and it was a common right, and the subjects of one colony might fish in another. This right remains to the inhabitants of the United States. Mr. Dane remarks, that a question may arise upon the words "have been wont to fish," as to the right of the inhabitants of one State to fish on the shores of another; but he thinks there can be little doubt that such right exists, though it does not extend *within the counties* of a State.(3)

32. The doctrines of the English law, above stated, have been generally adopted in this country; subject, however, in some of the States, to modifications, which are deserving of special notice.(4)

33. In Massachusetts, by a colonial law, each town was empowered

(1) *Jacobson v. Fountain*, 2 John. 170; *Gould v. James*, 6 Cow. 369; *Rogers v. Jones*, 1 Wend. 237; *Case of River Banne*, Davies, 149; *Hale de Jure Maris*, ch. 4; *Warren v. Matthews*, 1 Salk. 357; 3 Kent, 412; *Blundell v. Catterall*, 5 Barn. & Ald. 268; *Deerfield v. Arms*, 17 Pick. 41; *Comms., &c. v. Kempshall*, 26 Wend. 404; *Child v. Starr*, 4 Hill, 369; *Esson v. McMaster*, Kerr, N. B. 501; *Bowman v. Wathen*, 2 M'Lean, 376; *Mardin v. Waddell*, 16 Pet. 307.

(2) *Rogers v. Jones*, 1 Wend. 237.

(3) 2 Dane, 709. (For the opinion of Mr. Dulany, upon a similar point in Maryland, see 1 Har. & McHen. 564.)

(4) 17 John. 195; *Hooker v. Cummings*, 20; '90; 6 Cow. 518; *Berry v. Carle*, 3 Greenl. 269; *Scott v. Willson*, 3 N. H. 321; *Com. v. Charlestown*, 1 Pick. 180; *Adams v. Pease*, 2 Conn. 481; *Arnold v. Mundy*, 1 Halst. 1; 2 Dane, 692; *Browne v. Kennedy*, 5 Har. & J. 195; *Stoughton v. Baker*, 4 Mass. 527.

(a) This rule was applied to the patent from Chas. II, to the Duke of York, in reference to the right of fishery in New Jersey. 16 Pet. 367.

(b) It was formerly held, that every navigable river, as far as the sea ebbs and flows, is a royal river, and the fishery in it a royal fishery, belonging to the king, by his prerogative. But it has been since decided, that this prerogative applies only to the royal fish, viz., whale, and sturgeon; and that every subject may fish with lawful nets, both in navigable rivers, and arms of the sea. But a prescription for a right of fishery in the sea, as annexed to certain tenements, is bad. *Davies*, 152; *Warren v. Matthews*, 6 Mod. 73; 1 Salk. 357; *Fitzwalter's case*, 1 Mod. 105; *Ward v. Creswell*, Willes, 265.

to appropriate the right of free fishing, in navigable rivers, within itself, and the right was confined to householders. And the law is now settled, that the right of fishing in all rivers, not navigable, is subject to legislative control, unless secured by a particular grant or prescription. In Maine, it is said, that the right of taking shad, salmon and alewives, has been always subjected to public control.(1)(a)

34. So, in New York, the Revised Statutes regulate the right of fishery in both classes of rivers; particularly with regard to certain kinds of fish, and in the waters of the Upper Hudson. Jurisdiction of the same subject is given to the courts of common pleas, within their respective counties, in regard to streams, ponds, or lakes.(2) (See sec. 47.)

35. In New Jersey, it has been maintained, that the owners of land, upon navigable as well as other waters, had immemorially claimed a title to the soil, and to a several fishery in such waters fronting their land and shores; subject to the public right of passage, and to legislative regulations in regard to the fish. This doctrine was founded upon the ground, that the original grants from the king of England and the Duke of York passed a title to the soil covered by navigable water, as well as other land; and that this individual title has vested by regular transmission in subsequent proprietors, excluding the public common law right. But the doctrine has been set aside by a subsequent decision of the State court.(3)(b)

36. In Maryland, the original *proprietors*, claiming by grant from the king, are held to have acquired a right to land covered by navigable waters, subject to the public privilege of fishery. And this right has become vested in the State.(4)

37. In several of the States, individuals have, by usage, a several right of fishery in navigable waters, bordering upon their land.(5)

38. In Massachusetts, an ancient colony law of 1674, above referred to, (sec. 33,) provided, that every inhabitant, who is a householder,

(1) 3 Kent, 414; *Waters v. Lilley*, 4 Pick. 145; *Ingraham v. Wilkinson*, 1b. 268; *Vinton v. Wells*, 9 Ib. 87; 2 Dane, 688-712; *Cottrill v. Myrick*, 3 Fairf. 229; *Lunt v. Hunter*, 16 Maine, 1.

(2) 1 N. Y. Rev. St. 687-8.

(3) Griffith's Law R. New Jersey, Fisheries; *Arnold v. Munday*, 1 Halst. 1.

(4) *Browne v. Kennedy*, 5 Har. & John. 195. See *Delaware, &c. v. Stump*, 8 Gill & J. 479.

(5) Angell on Tide W. ch. 7.

(a) In the same State, the legislature may regulate the whole subject of fishery in fresh waters. *Peoples v. Hannaford*, 6 Shepl. 106. In tide rivers, as in the sea, the right of fishery is common to all. So the right of taking shell fish on the shore. *Parker v. Cutter, &c.*, 7 Shepl. 353. But fishery in navigable waters is subject to legislative control. *Fuller v. Spear*, 2 Shepl. 417. In Massachusetts, a town has no right to grant the privilege of taking oysters. A contract for that purpose is void. *Dill v. Wareham*, 7 Met. 438.

The right of taking *clams* from flats lying between high and low-water marks, and within 100 rods of the upland, is in this commonwealth, as at common law, a public right, and does not, by virtue of the colony ordinance of 1641, belong exclusively to the owner of the upland. And in any town where such right has not been limited by particular statute, all the inhabitants may lawfully enter upon such flats, for the purpose of digging and carrying away clams. *Weston v. Sampson*, Law Rep. Jan. 1854, 493; 8 Cush. 347.

(b) In 1831, the legislature passed an act to extinguish the title of the Delaware Indians to the fisheries and bays, for \$2,000, at the same time claiming that the right had been lost by abandonment. 3 Kent, (5th ed.,) 395, n. b. The Supreme Court of the United States has decided, that the property in the oyster fisheries, in the public rivers and bays in East New Jersey, was vested in the State by the Revolution, and afterwards in the grantees, under the act of New Jersey, in 1824. *Mardin v. Waddell*, 16 Pet. 367.

shall have free fishing and fowling, in any great ponds, bays, coves, and rivers, so far as the sea ebbs and flows, within the town where they dwell, unless the town, or the general court, have otherwise appropriated them; provided, that no town shall appropriate to any person or persons a great pond of more than ten acres; and that no one shall come without leave upon another's property, otherwise than as hereafter expressed. (The statute then proceeds to provide for the ownership of the seashore, as stated in ch. 68.) And for great ponds lying in common, though within a town, any man may fish and fowl there, and may pass on foot through any man's property for that end, so he trespass not upon any man's corn or meadow.

39. Mr. Dane remarks, that this law is now constantly practised upon, in regard to harbors, beaches, flats-grounds, &c., as well as to fishing and (*flowing*) fowling, taking sand, sea manure and ballast. Also, in regard to great ponds, many actions have been brought. No instance is recollected of a town appropriation, as authorized by the act. It is questionable whether the practice of free fishing, and fowling has been confined to householders, or to the limits of a person's own town. The act alters the common law, as it limits the right of passing over the lands of others to great ponds, by exempting from this right all tillage and mowing land, and thereby allowing persons to go over pasture and some lands of others. This has been the general practice. Hence, going over other men's lands, to fish and fowl in other waters than great ponds, remained as at common law.(1) Mr. Dane further remarks, that the practice on this colony law has been uncertain, if not as to clams and oysters, it has been as to fishing and fowling. The inhabitants of one town have often fished in another, and there have scarcely ever been any town limits as to fowling. But, by this law, a man's privilege to fish and fowl seems to be as much confined to his town limits, as other town privileges.(2)

40. In Massachusetts, the legislature may unquestionably regulate the taking of fish within the State, and oblige all the citizens to conform to the regulations, by inflicting penalties. This right has been so long used, and so beneficially for the public and the towns, that it ought not now to be called in question. Without it, great confusion would take place in the use of the privilege, and probably the privilege itself would soon cease, by the destruction of the fish. One of the earliest, and, it seems, the most frequently occurring subjects of legislation, has been that of the fisheries. Though a source of profit and support to multitudes of people, it was found, also, to be a fruitful source of disorder and contention, both between individuals and towns, who became owners of the banks of rivers. It has been argued, that the legislature had no constitutional right to divest the fishery, in rivers not navigable, from the proprietors of the banks, and vest the franchise in the town. Upon the principles of the English common law, the argument is well founded; but the constant course of legislation here, from the first settlement of the country, has qualified this right, by subjecting it to legislative control.(3)

41. So, it is said, in Maine, that the legislature had an undoubted

(1) 2 Dane, 693, 694.

(2) 2 Dane, 699.

(3) Burnham v. Webster, 5 Mass. 269;

Nickerson v. Brackett, 10 Mass. 216; Com. v. Chapin, 5 Pick. 203, 204; Vinton v. Welsh, 9 Pick. 91, 92.

right to put in common that which in England is private property.(1)
(See sec. 58.)

42. It is suggested, as a doubtful point, whether the legislature may provide for the removal of natural obstructions, or the erection of artificial facilities, in the bed of a stream, for the ascent of fish, and the creation of a fishery, where they could not otherwise pass, without the consent of, and a compensation to, the riparian proprietor. But the legislature may regulate streams, in which alewives and certain other fish have been accustomed to ascend. And no individual can prescribe against this public right.(2)

43. In Massachusetts, towns adjoining, or extending across a navigable river, may own the soil of the flats, and even of the channel, by virtue of a grant from the government; but the property in the fish, and also of all tide waters, is in the public. But it seems to be a part of the common law of the State, that the town may appropriate the fish, if not appropriated by the legislature; but for taking the fish no man could lawfully go on the soil of another. This rule probably originated from a *declaration of common liberties*, made by the general court of the colony, in 1641. If, therefore, no appropriation has been made of the fish, any citizen may take them, not trespassing on others' land. But any town adjoining a river may appropriate the fish *taken* within its limits, and, in order to give the town on the opposite side the same right, the limits must not include tide waters, but the shores on which the fish are drawn and placed, when they may be said to be *taken*. If *taken*, when caught swimming, a conflict of rights must arise. And where the channel is not granted, fish swimming there, out of the limits of any town, would not be subject to appropriation. Where towns have specifically regulated the right of fishery within their limits, the place of fishing is always understood to be that part of the shore used for employing seines and nets, or other engines, and for bringing the fish to land; and not any part of the tide waters in which they were swimming.(3)

44. A statute imposed a penalty on such persons as should take fish within the town of A, unless authorized by said town. The defendant caught fish with a seine in Charles River, at a place where the town of A was on the north, and the town of B on the south side, putting in the seine on the B side, extending it across the river over the flats on the A side, and drawing it on shore on the B side, with the fish in it. Higher up the river, A lies on both sides of it, where there was a convenient place for the fishery, called the A fishery, and where the inhabitants of A were used to fish, and not elsewhere. The fishery carried on by the defendant in B, was an accustomed fishery for the inhabitants of B. Held, independently of the Statute, the defendant had a clear right thus to take fish; that the act was designed to enable the town of A to regulate its own rights then subsisting, and not to grant any new ones; and, therefore, as it must be construed strictly, applied only to the fishery at the place where A lay on both sides of the river, and not where the defendant had taken fish.(4)

45. In New York, it is held, that a patent to the inhabitants of a town may include an exclusive right of fishery in the waters within its

(1) 3 Fairf. 229.

(2) Cottrill v. Myrick, 3 Fairf. 222.

(3) Coolidge v. Williams, 4 Mass. 144, 145.

(4) Coolidge v. Williams, 4 Mass. 140.

limits. And such right becomes part of the common property of the town, subject to municipal regulation. It must, however, be so used, as not to annoy the passage of ships or boats, and is subject to the laws of the State for the conservation of fish or fry.(1)

46. A town, to which such patent had been made by Sir Edmund Andross, under Charles II, passed a by-law, with a penalty, that no person, not an inhabitant, should rake or take oysters in the creeks or harbors thereof. The defendant, a citizen of New York, but not of this town, entered the harbor or bay, and caught and carried away a quantity of oysters, about 100 yards from the beach. In a suit against him, the defence was, that the bay, being an arm of the sea, was a common fishery for all the inhabitants of the State; but judgment was rendered against him.

47. In the same State, a statute required the owners of mills or other dams, across any river or creek running into the lakes, so as to obstruct the usual course of salmon in ascending them, to make slopes in their dams over which the fish might pass. Held, the act impliedly excepted streams not navigable, which had been without reservation granted by the State, or, so far as it applied to such streams, was unconstitutional and void, as impairing the obligation of a contract; and that the owner of such a stream was not indictable for damming it near the mouth, either at common law, or under the act.(2)

48. In the same State, however, it is said, the legislature have confessedly the right of regulating the taking of fish in private rivers, and do every year pass laws for that purpose, as to rivers not navigable in any sense, and which are, unquestionably, private property.(3) See sec. 34.)

49. In Pennsylvania, it is held, that the large rivers in that State, such as the Delaware and Susquehanna, are to be deemed *navigable*, with respect to the public right of fishery, above the ebb and flow of the tide. It seems the same doctrine is adopted in South Carolina. In North Carolina it is held, that no general or exclusive right of fishery exists in *navigable waters*; and these are held to be such, as afford a common passage for sea vessels.(4)

50. The cases in Pennsylvania, in which this doctrine was established, have been freely criticised, and must be considered as to some extent overruled, by subsequent decisions.

51. In the case of *Carson v. Blazer*, (2 Binn. 475,) only two of the judges gave opinions upon the point decided; and they admit the common law right in favor of the proprietor of the bank; but they supposed that this part of the common law had not been adopted, as it was not deemed proper in that State. They placed great stress too on several acts of assembly, declaring the Susquehanna to be a highway, and regulating the fisheries, which they held to be incompatible with the common law right.(5)

52. When *Carson v. Blazer* was tried, no law to regulate fisheries in the Susquehanna had been enacted. Several will be found since, the provisions in which, have made the law in that river very different from the positions decided in that case. The case of *Shrunk v. Schuyler*

(1) *Rogers v. Jones*, 1 Wend. 237.

(2) *People v. Platt*, 17 John. 195.

(3) *Hooker v. Cummings*, 20 John. 101.

(4) *Carson v. Blazer*, 2 Bin. 475; *Shrunk*

v. President, &c., 14 S. & R. 71; *Cates v.*

Wadlington, 1 McCord, 580; *Collins v. Ben-*

bury, 3 Iredell, 277.

(5) *Hooker v. Cummings*, 20 John. 100.

kill, &c., was decided under the following circumstances. When the Delaware was declared a navigable stream and public highway, this declaration gave certain rights to all persons navigating it, and left in the State the power to regulate and improve the navigation at pleasure. They accordingly prohibited the erection of dams, &c., in the Schuylkill, (Delaware?) and subsequently passed a law to improve the navigation, and render the stream generally and permanently useful. This law was complained of as an injury to Shrunks's fishery. It was decided that the State might, though an individual could not, improve the navigation, even to the damage of an owner of the bank.(1)

53. In a recent case, in the same State, reference was made to a series of ancient statutes regulating the fisheries, and to an agreement, made in 1783, between Pennsylvania and New Jersey, providing that each State should regulate and guard the fisheries on the Delaware, and prevent their being interrupted by vessels, "or by persons fishing under a claim of common right;" and the conclusion was drawn by the court, that these public acts are predicated upon the idea of *separate fisheries* previously existing. The same inference is confirmed by a statute of both States, passed in 1809, prohibiting any person from throwing out a net above, or drawing it in, or even letting it swing below his own line, on land. No man can be interrupted in his fishery opposite his own land. The act further recognizes, that a fishery may belong to the owner of the shore, or to some one else, or to a company, who give bond to conform to the law.(2)

54. The public right of fishery in navigable waters does not give a right to enter or draw a seine upon private lands, for the purpose of taking fish. So the public have no right to go upon a rock owned by an individual, in navigable water, for the purpose of fishing.(3)

55. By the erection of Fairmount dam, in the river Schuylkill, a rock just below the dam, formerly private property, and above low water mark, became surrounded by water, and dry only at and about low tide. Held, it still belonged to the former owner, and all persons had not a right to stand there and fish with hoop nets.(4)

56. A Massachusetts colony law of 1646, reciting that foreign fishermen had been accustomed to use unsettled harbors and places, and to take wood and timber at their pleasure, forbids fishermen to enter on lands granted to any town or person, or to take wood, &c., there, without leave, unless employed by an inhabitant, &c.(5)

57. But, on the other hand, it has been held, that though the *seashore*, between high and low-water marks, be owned by an individual under a grant, the public still have a right to cross it for the purpose of fishing, or even to dig shell fish upon the shore itself; unless the owner can show an exclusive title, by prescription. These decisions, however, have been doubted.(6)

58. The statutory provisions in the several States, in relation to fishery, in addition to those already incidentally referred to, are very numerous. Much the larger portion of them, however, are local in their application, and acts of this description do not properly find a

(1) *Hart v. Hill*, 1 Whart. 135-36.

(2) *Ib.* 124.

(3) *Lay v. King*, 5 Day, 72; 14 S. & R. 9.

(4) *Com v. Shaw*, 14 S. & R. 9.

(5) 2 Dane, 707-8.

(6) *Bagott v. Orr*, 2 Bos. & P. 472; *Peck v. Lockwood*, 5 Day, 22; *Blundell v. Catterall*, 5 B. & A. 268; 3 Kent, 416, *u.*

place in the present work. From the general tenor of the laws in the different States, it would seem quite clear that Massachusetts is not peculiar in exercising legislative control over the fisheries, even in rivers not navigable.(a)

59. In Massachusetts,(b) the Revised Statutes prohibit the poisoning of fish;(c) the taking of pickerel and trout, except by hooks and lines, or between December 1, and April 1, ensuing; the taking of fish by persons living without the State, within the harbors or waters of certain towns, to be carried away; the taking of oysters from their beds, destroying them, or wilfully obstructing their growth, except by license from the selectmen, or by an inhabitant of the town, for the use of his family, from September 1 to June 1; the taking, &c., of other shell fish, in certain towns, with the same exceptions. But the provisions as to shell fish do not extend to the Indians, or to the using of them for bait, within a certain quantity.(1)

60. In Maine,(d) the taking of English herring, for smoking or pickling, between March 1 and September 1, and between sunset on Saturday and sunrise on Monday, is prohibited. The kind of net to be used in fishing is prescribed; and it must be placed lengthwise of the stream. No person, not a citizen, shall place any machine in the waters of the State, for catching shad, salmon, herring or alewives. The shooting of pickerel or trout, or spearing them at night, is forbidden. The same provisions as to shell fish, as in Massachusetts.(2)

61. In Rhode Island, oysters shall not be taken by any mode, tending to destroy them more than the use of tongs; nor between May 15 and September 15. In the taking of lobsters, no one shall use more than two pots or nets.(3) (Numerous local provisions as to the obstruction and taking of fish.)

62. In Connecticut, any town may regulate the taking of clams and oysters within its limits, and in the adjoining waters and flats. Subsequent acts provide, that towns may regulate fishery in ponds, and in streams. Where one person makes a wear for fish on a flat, within any river, cove, creek, or harbor, it shall not be interrupted by another wear on the same flat, or in the way of the fish coming to the former, nearer than three-quarters of a mile, without leave of court. Oyster-ponds may be enclosed by the owner in salt water, with the approbation of the selectmen, &c. Between March and November, no person shall gather oysters or shells. But this does not apply to those planted by the party

(1) Mass. Rev. St. 392-5. See Sts. 1839, 1822; 1840, 146, 148; Hyde v. Russell, 2 Cush. 251. (2) 2 Smith, 889-90-1-2. (3) R. I. L. 508-18.

(a) One of the questions proposed by Mr. Griffith, in compiling his valuable *Law Register*, was, whether an owner of land, upon a river where the tide flows, has a several fishery in front of his land. The same question, in relation to fresh water streams, would probably have elicited equally important information.

(b) I am unable to find in the Revised Statutes any re-enactment of the act, so often referred to in this chapter, giving authority to towns to regulate the right of fishery within their limits. See Sts. 1852, 815.

(c) So in New York, (1 Rev. St. 687,) South Carolina, (3 Brev. Dig. 129-30,) and Kentucky, (1 Ky. R. L. 724.)

(d) In this State, recent acts (1838, 508; 1837, 401,) empower a single town, and towns on a certain river, to regulate fishery in their limits. Hence it might be inferred, that towns in general have not the authority upon the subject existing in Massachusetts. (But see sec. 41.) By the Revised Statutes, fish-ways are provided for. Rev. St. 305.

himself. The inhabitants of the State may plant in navigable waters, oysters brought from out of the State, under authority of a town committee. But this right is not to affect any owner of lands having salt creeks or inlets, or which are opposite or contiguous to the waters where they are planted; nor the rights of individuals; nor the by-laws of any place; nor any rights in a natural oyster-bed, or in navigation. No person but the owner, shall take oysters by night.(1)

63. In New York, salmon shall not be taken between October 20, and February 1; nor, between these months, at or below the city of New York, between sunset on Saturday and sunrise on Monday; nor any net used between these hours; nor, in the months of March, April and May, a drift net, at the above place.(2)(a)

64. In New Jersey, no one but a resident citizen, (except in the Delaware river,) shall fish with a seine elsewhere than opposite his own shore. The taking of clams is also specially regulated.(3)(b)

65. In Delaware, no person, not a resident citizen, shall carry away oysters, terrapins, or clams. No wear or net shall be placed across the channel of a creek or river. But wears may be made over mill-dams or races, or on one's own land, if not injurious to others.(4)

66. In Virginia, a dam shall not be rebuilt, without an inquiry by jury, as to the obstruction of fish. And no one shall place any obstruction, unless regularly authorized. No one shall shoot, hunt or range, fish or fowl, on the lands or waters of another, without license. The ownership of land upon the ocean, the Chesapeake Bay, and its rivers and creeks, extends to low-water mark; but any one may fish, fowl and hunt, on such shores as are now, (1819,) used as commons. The act does not apply to a creek or river included in any survey, and is subject to some exceptions, by virtue of former acts. The rights of opposite owners may be fixed by commissioners.(5)(c)

67. In South Carolina, a statute requires the owners of existing dams, to make slopes or openings for the passage of fish, the sufficiency of which is to be determined by commissioners.(6) Commissioners are also appointed to make fish sluices in rivers, the obstruction of which is a public nuisance. All fishing with nets, traps, &c., within eighty yards of dams erected by the State, for the purpose of making rivers navigable, and having sluices, is prohibited. Where a dam is built for the propelling of machinery, the owner may, at his election, leave sixty feet, in width, of the river open, or keep open a sluice in February, March and April.(7)

68. In North Carolina, in the *laying off* of rivers, the commissioners shall allow three-fourths to the owner, to erect stops, dams and stands,

(1) Con. St. 236-41-2-7-8; 1842, 48-50; 1845, 41-2. See, also, St. 1838, 26.

(2) 1 N. Y. Rev. St. 687-8.

(3) 2 N. J. L. 156-7; St. 1845, 85; Elmer's Dig. 205.

(4) Dela. St. 274, 552. See Ib. 1843, 465-

6. See also *Mardin v. Waddell*, 16 Pet. 367.

(5) 2 Vir. Rev. C. 230, 311, 341; Code, 525.

See St. 1840-1, 90.

(6) 3 Brev. 120, *et seq.*

(7) S. C. St. 1827, p. 79.

(a) For the mutual privileges of the States of New York and New Jersey, in relation to fishery, see N. Y. L. 1834, 10.

(b) For the compact between Pennsylvania and New Jersey, as to fishery in the Delaware, see 1 N. J. L. 57. As to other provisions on the same subject, see St. 1845, 152.

(c) In Virginia, a grant of land to the United States, sometimes reserves the right of drawing a seine upon the land. 1 Rev. C. 49.

and one-quarter, including the deepest part, for the passage of fish. They shall also require a sufficient slope in mill-dams. The part thus left open shall not be obstructed. No net shall be placed across the main channel of a navigable stream, nor any obstruction to fish, more than three-quarters across the channel. Subject, however, to the right of any person to work and haul a seine, as heretofore. By a late act, seines, &c., are forbidden in navigable waters.(1)

69. In Alabama, where one erects a fish-dam on a water-course, reported to be navigable by a United States' surveyor, he shall open in the deepest channel, one-third of the stream, including the main channel.(2)

70. In Michigan, the diversion from their natural course of *white fish* is forbidden.(3)

CHAPTER LXXIV.

TITLE TO REAL PROPERTY.

2. Definition of title.
3. Stages or degrees—possession.
4. Right of possession—entry.
6. *Apparent* and *actual* right.

8. Loss of right of possession—*right of property*.
9. *Discontinuance*.
10. Complete title.
11. *Remitter*.

1. HAVING considered the several kinds of real property, and the estates or interests that may be owned therein; we now proceed to treat of the title to such property, and the modes of acquiring or losing such title.

2. Lord Coke defines a title as "*justa causa possidendi id quod nostrum est*." In other words, it is the means whereby the owner of lands hath the just possession of his property.(4)

3. There are several stages or degrees of title to real property. The first is, mere *occupancy* or *possession*. Without this, on the one hand, no title is complete or perfect; while, on the other hand, possession alone is sufficient to give a *prima facie* good title. Thus, if an owner of land is disseized, or turned out of possession wrongfully; although the disseizor gains a mere naked possession, which the owner may at any time defeat by entry, yet until such entry is made the disseizor has a *prima facie* good title.(a)

4. The next step to a perfect title is *jus possessionis*, the *right of possession*. In the case supposed of a disseizin, this right is in the disseizee, while the possession is in the disseizor.(5)

5. At common law, where a party who had entered wrongfully either

(1) 1 N. C. Rev. St. 535-6; St. 1844-5, § 62.

(2) Aik. Dig. 442.

(3) Mich. L. 475.

(4) Co. Lit. 345 b.

(5) Co. Lit. 266 a.

(a) Where a son goes into possession of his father's land and makes improvements, a jury cannot infer from this fact alone a gift by the father. *Hugus v. Walker*, 12 Penn. 173.

conveyed the land to another person, or died and transmitted it to his heir, the rightful owner could not regain possession by mere entry, but must resort to an action for that purpose; because the purchaser or the heir was presumed to come in rightfully, and could not, therefore, be summarily turned out. But this rule has been changed by statute, as will be seen hereafter.(1) (Ch. 75.)

6. The right of possession is either *apparent*, or *actual*. Thus, the heir of a disseisor, at common law, had an *apparent* right, because not subject to be turned out by mere entry; while the actual right was in the disseizee, who might enforce it by a real action.

7. Where an owner brings his action to recover possession of the land, within the time fixed by the statute of limitations, he may regain it by judgment of law. But if he neglect to bring an action within that time, he loses his right of possession.

8. There still remains, however, the last stage or degree of title, *jus proprietatis*, the *right of property*. In this case, the estate is said to be divested, and turned to a *mere right*—*merum jus*; to enforce which, and regain the land, no *possessory* action will lie, but only a *real action*, or *writ of right*.

9. In some cases, a conveyance, by the lawful tenant of land, of a greater estate than he has the right to dispose of, reduces the lawful owner to a mere right of property. Thus, if a tenant in tail undertake to convey in fee, the issue, or, for want of issue, the reversioner or remainder-man, after his death, can regain the estate only by a writ of right. The same rule applies, where a parson, seized *jure parochiæ*, or a husband, *jure uxoris*, undertakes to convey the fee. Either of the above-named conveyances is called in law, a *discontinuance*.

10. Possession, the right of possession, and the right of property, termed in the ancient law, "*juris et seisinæ conjunctio*," are necessary to constitute a complete title. The right of possession and the right of property, are called "*jus duplicatum*," or *droit droit*.

11. Where one comes into possession of land having two titles, the one imperfect, and the other perfect, he shall hold it by the latter. Thus, if a tenant in tail *discontinue* the estate by a conveyance in fee, afterwards disseize the discontinuee, or grantee, and die seized; his heir shall hold as heir in tail under the original title, and not under the title acquired by the disseizin. This operation of law is termed a *remitter*, and the heir is said to be *remitted*. Of course, the grantee can maintain no action against the heir for the land, as he might do if the latter claimed under the later title. The reason of the rule is, that inasmuch as the heir is himself in possession, there is no party against whom he could maintain an action upon his perfect title.

12. The doctrine of remitter is applicable, only where the defective title comes to a party by *act of law*, such as descent; not where he acquires it by purchase or his own voluntary act, for this is regarded as a waiver of the better title.

13. And the principle is of course inapplicable, where the party who inherits a defeasible title has been legally barred, by the act of his ancestor, of the estate, which he would otherwise have inherited; as where

(1) Co. Lit. 237 b, 238 a, 256 a; Lit. 402.

a tenant in tail, in the United States, has, by a conveyance, barred the entailment.(1)(a)

CHAPTER LXXV.

TITLE BY PRESCRIPTION.

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| <ol style="list-style-type: none"> 1. General division of the modes of acquiring title. 2. Prescription—nature and foundation of the title. 6. To what kind of property applicable; whether to lands and tenements. 13. Prescription <i>positive</i> or <i>negative</i>. 14. Prescription and custom; points of resemblance and distinction. 22. Prescription <i>in the person</i>, or in a <i>que estate</i>. 23. To what rights applicable; matters of record; grant; lost grant. 25 <i>Que estate</i>, for what. | <ol style="list-style-type: none"> 27. Time of prescription. 31. What user necessary; continued, <i>peaceable</i>, &c. 33. Certainty, reasonableness, &c. 37. Whether one may prescribe against a statute. 38. Constitutional rights, no prescription against. 39. One prescription cannot contradict another. 40. How destroyed. 44. Descent of prescriptive right. 45. Prescription in the United States. |
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1. THE general classification of the modes of acquiring title to real property, is: 1, by *descent*; 2, by *purchase*. The correctness of this division, however, has been of late denied, and the substitute proposed, of a division into title by *purchase*, to which the act or agreement of parties is necessary, and title *by law*, including not only descent, but also *escheat*, and some other modes of acquisition of a somewhat mixed character.(2)(b) In this uncertainty as to the most correct *philosophical*

(1) Co. Lit. 325 a; Lit. sec. 658, 661; 3 Bl. Com. 20; Co. Lit. 349 b; Doe v. Wood-
 roffe, 10 Mees. & W. 608; Draughan v. French, 4 Port. 352.

(2) Co. Lit. 18 b, n. 2; 1 Steph. 354.

(a) A principle analogous to that of *remitter* was applied in the following case. A being disseized, and having lost his right of entry, but not of action, entered, and was sued by the disseizor. Held, he might set up his title by way of *rebutter*, as a defence. So, also, in relation to the whole land, though he was originally a tenant in common, and received the shares of the other tenants, while disseized. Wade v. Lindsey, 6 Met. 407.

Land conveyed was described as bounding on that of an adjoining owner, of a part of which land the grantor was in fact disseized, such adjoining owner being then in the occupation of that part, under a mistaken belief of both that the line of occupation was the true line. The grantee entered, removed the fence from the supposed to the true line, and remained in possession accordingly. Held, by way of *rebutter*, and to avoid circuity of action, he might avail himself of his title, in defence to a writ of entry brought by the adjoining owner. Cleave-land v. Flagg, 4 Cush. 76.

(b) Curtesy and dower are sometimes classed under the head of title *by descent*. 4 Kent, 373; Co. Lit. 18 b, and n. 106. With regard to the title by *escheat*, which in the English law is of strictly *feudal* character, and of course has no existence precisely as such in the United States; it may be sufficient to remark, in the language of Chancellor Kent, that by a universal principle of American law, when the title to land fails from defect of heirs or devisees, it necessarily reverts or *escheats* to the people, as forming part of the common stock to which the whole community is entitled. Whenever the owner dies intestate, without leaving any inheritable blood, or if the relations whom he leaves are aliens, the lands vest immediately in the State by operation of law. So, if an alien comes to the possession of land by purchase, the State may claim it through an inquest of office, instituted by an authorized public officer. 4 Kent, 423-4. (See *ante*, vol. I., ch. 2; *Infra*, ch. 77.) In case of *escheat*, the land is still liable to creditors. Evans v. Brown, 5 Beav. 114. In Vermont, in case of *escheat*, the land may be claimed, by one entitled, within thirty-seven years. Rev. St. 299.

arrangement of the subject, I prefer to adopt a succession of titles, founded in part upon their respective analogy to what has gone before, and to each other, and in part upon their comparative practical importance. With reference to the former of these principles of classification, the title to real property first in order, as the most natural sequence to the subject of title in general, considered in the last chapter, is *title by prescription and custom*.

2. Title to real property by *prescription*, is that title which arises from a long and continued possession thereof; and is founded upon the presumption, that the party would not have been allowed by other claimants to hold such possession, without a just and paramount right.(a)

3. Prescription, in the ancient sense of the word, rests upon the supposition of *a grant*; and therefore the use or possession on which it is founded must be *adverse*, or of a nature to indicate that it is claimed as a right, and not the effect of indulgence, or of any compact short of a grant. Presumptions of this nature are adopted, from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They are founded upon the consideration, that the facts are such as could not, according to the ordinary course of human affairs, occur, unless there was a transmutation of title to, or an admission of an existing adverse title in, the party in possession.(1)

4. It is said, every prescription is *against common right*.(2)

5. A prescription, which deprives the owner of the whole interest and profit of his land, is not good. Otherwise with one which restrains a particular profit only.(3)

6. *Prescription*, technically so called, is generally treated as exclusively applicable to incorporeal hereditaments,(b) upon the ground that more certain evidence may be had of a title to *lands*, &c.; although Bracton, borrowing his doctrine from the civil law, seems to consider it as alike effectual with respect to corporeal and incorporeal property.(c) And, according to Littleton and Lord Coke, there may be a tenancy in common of land by prescription; as where one and his ancestors, or they whose estate he hath in one moiety, have held it in

(1) *Gayetty v. Bethune*, 14 Mass. 53; *Richard v. Williams*, 7 Wheat. 109; *Donnell v. Clark*, 1 Appl. 174. (2) *London's case*, 8 Rep. 125; 3 Cruise, 309. (3) *Punsany v. Leader*, 1 Leon. 11.

(a) Mere *reputation* of title is to be distinguished from prescription. Title to real estate cannot be acquired in the former mode. *South, &c. v. Blakeslee*, 13 Conn. 227. Thus, evidence of a prevalent opinion in the neighborhood, that certain premises belonged to the State, or city, is inadmissible, as such fact could not prevent the acquisition of title thereto by disseizin. *Casey v. Inloes*, 1 Gill, 430. So, on the other hand, where there was a continued possession of land for forty-seven years, though the party in possession had, during that time, declared, that he did not believe there was a grant, and attempted to procure one from the State; held, the evidence should go to the jury, whether a grant had been made, and that a grant could be presumed. *Bullard v. Barksdale*, 11 Ired. 461. *Tradition* may be good evidence of boundaries. Thus, aged men may testify to what they have heard said by other old men, since deceased. *Wooster v. Butler*, 13 Conn. 309. Possessions of ancient date of which there can be no living witnesses, and of which no written evidence can be presumed to exist, may be proved by hearsay, and other evidence, which would not be admissible to prove modern facts. *Casey v. Inloes*, 1 Gill, 430.

(b) Thus it is held not to apply to a right to the use of a saw-mill erected on another's land. *Ferris v. Brown*, 3 Barb. 105.

(c) There are many instances, in which courts have considered that a jury are warranted in presuming anything in support of the future quiet of a long possession. Ang. on Lim. 29.

common with the other tenant, who hath the other moiety, and with his ancestors, &c., time out of mind. The principle, of course, does not apply to joint tenants, on account of survivorship.(1)

7. Neither custom nor prescription can give a right to erect a building on another's land. This is a mark of title, and of exclusive enjoyment, which requires the higher evidence of corporeal seizin, and inheritance.(2)

8. In this country, the doctrine of Bracton, that a grant of *lands*, as well as incorporeal hereditaments, may be presumed, seems to have been generally adopted. Thus, in Massachusetts, where husband and wife joined in a deed of her land, but the deed contained no words of conveyance by her; and the grantee and his assigns were in possession fifty years, and the wife and her children lived in the immediate vicinity; it was held, that the jury might presume a grant from the wife to the husband, previous to his conveyance. So, in the same State, it is held, that an adverse possession for twenty years or more warrants the presumption of a deed, and of the doing of all acts necessary to give it effect.(3)

9. It is said by Judge Story, that a grant of land may as well be presumed, as a grant of a fishery, or of common, or of a way; and, where the other circumstances are very cogent and full, there is no absolute bar against the presumption of a grant, within a period short of the statute of limitations.(4)(a)

10. So, it has been held in Maryland, that although the law requires deeds to be recorded, yet, for the purpose of quieting possession, upon proper foundations, the court will direct the jury to presume the existence of a deed.(5) And a grant will be presumed, where there has been an actual, adverse, exclusive, and continuous possession, under a claim of title, for twenty years; and it is not necessary that the jury, in their consciences, should believe in the actual execution of any such grant.(6) So, in Ohio, after possession for twenty years, in Kentucky for thirty years, in case of a clear equitable claim, a deed will be presumed. But the acknowledgment of a deed cannot be.(7)

11. So it has been held in New York, that where A dies in possession of land, to which possession his heirs succeed, and retain it over eighteen years; a purchase by A may be presumed. Also, that where an order of the council of the colony is proved, for the survey of a lot as allotted to B, and a survey, but no patent on record; such patent to B, and a deed from him to A, shall be presumed.(8) So, where a per-

(1) Brac. lib. 2, ch. 22; 3 Cruise, 307-8; Ang. on Lim. 23; Lit. 310; Duncan v. Clark, 7 Watts, 217; Holyoke v. Haskins, 5 Pick. 27.

(2) Cortelyou v. Van Brundt, 2 John. 362.

(3) Melvin v. Prop'r's, &c., 16 Pick. 137; Prop'r's, &c. v. Bullard, 2 Met. 363. See, also, Ryder v. Hathaway, 21 Pick. 298; Valentine v. Piper, 22, 85; White v. Loring, 24, 319; Arnock v. Holman, 3 Strobb. 122; Den v. Mulford, 1 New Jersey, 500; Stockdale v. Young, 3 Strobb. 501 n.; Brackett v. Evans, 1 Const. 79; King v. Little, 1

Cush. 436; Metcalf v. Van Benthuyssen, 3 Const. 424; Baird v. Wolfe, 4 McL. 549; Fauntberry v. Henderson, 12 B. Mon. 447; Blake v. Davis, 20 Ohio, 231; Doe v. Eslava, 11 Ala. 1028.

(4) Ricard v. Williams, 7 Wheat. 109, 110.

(5) Burke v. Negro, &c., 6 G. & John. 141.

(6) Casey v. Inloes, 1 Gill, 430.

(7) Coureir v. Graham, 1 Ohio, 349. (But see 5, 456;) Berthelemy v. Johnson, 3 B. Monr. 92; Roads v. Symmes, 1 Ohio, 316.

(8) Jackson v. McCall, 10 John. 377.

(a) So, in Pennsylvania, a boundary line acquiesced in for thirty years, without fraud, is conclusive of the title. Chew v. Morton, 10 Watts, 321.

son entered upon land under a contract to purchase, and continued in possession over thirty years, claiming as owner; held, a deed in fee from the original vendor, or from one succeeding to his rights, might be presumed. So, it seems, after twenty years.(1) In Alabama, twenty years' possession, under claim of title, raises the presumption of a grant.(2)

12. So in Maine, a grant of wild land, unoccupied, has been presumed, after seventy years' adverse claim, where the claimant had been taxed as owner, and held offices in the corporation of proprietors.(3)(a)

12 *a.* The defendant, in an action of trespass to try title, claimed the land under a release to A from the original grantee, made in 1799, also a release from the heirs of A to B in 1806. It appeared that there was a continuous possession under A's title from 1799, and the defendant had actual possession of part of the tract, claiming the whole, from 1819, nearly thirty years before the trial. Held, the time was sufficient to raise the presumption of a deed, or other intermediate conveyances of the title of A and B to the defendant.(4)

13. The practical importance of the question above referred to, is much diminished by the fact, that both in England, and in all the United States, it is provided by express statutes, that the uninterrupted possession of land for a certain period shall confer an absolute title thereto; or, in other words, that after the lapse of such period, no adverse claimant shall have any right of entry or of action, to regain the land. Upon this ground, it is said, there are two kinds of prescription in the English law; the one at common law, arising from *immemorial usage*, and called a *positive prescription*; the other, founded upon express *statutes of limitation*, and called negative. The latter of these subjects will be considered in the next chapter.(5)

14. A mode of acquiring title very nearly allied to the title by prescription, is *custom*. The principles which govern these two titles are, in general, the same; though there would seem to be no doubt, that the latter is exclusively applicable to incorporeal hereditaments.

15. The distinction between prescription and *custom* is said to be, that custom is a *local usage*,(b) not annexed to the person; as, for instance, for all the tenants of a manor to have common of pasture; while prescription is always annexed to a particular person. An *easement* is said to be a service or convenience that *one neighbor hath of another*, and may be claimed by prescription; but a *multitude* of

(1) *Maltonner v. Dimmick*, 4 Barb. 566.

(2) *Stodder v. Powell*, 1 Stew. 287.

(3) *Farrar v. Merrill*, 1 Greenl. 17.

(4) *Gray v. Bates*, 3 Strobb. 493.

(5) 3 Cruise, 307. See *Lewis v. Carstairs*, 5 Watts & S. 205.

(a) It is a case somewhat analogous to the presumption of a grant, where a claimant has stood by and seen improvements made upon the land by another. In such case, the former is *estopped* in equity to assert a title. *Higinbotham v. Burnet*, 5 John. Cha. 184. See *Estoppel*.

(b) Common examples of claims by *custom*, in England, are *way-going crops*, (*Wigglesworth v. Dallison*, 1 Doug. 201; *Beavan v. Delahay*, 1 H. Bl. 5;) *gleaning*, (*Steel v. Houghton*, 1 H. Bl. 51; *Wortledge v. Manning*, Ib. 53, n.; *Rex v. Price*, 4 Burr. 1925;) *playing at games*, (*Fitch v. Rawling*, 2 H. Bl. 393;) erecting booths at fairs, (*Tyson v. Smith*, 9 Ad. & Ell. 401;) methods of taking down buildings in a city, (*Bradbee v. Governors, &c.*, 2 Dowl. P. C. 164;) taking stones from a beach to repair the highway, (*Clowes v. Beck*, 7 Eng. L. & Eq. 42.) A right may be claimed by *prescription* for individuals, or the inhabitants of a particular district, to pass a gate, free of toll. *Panton, &c. v. Bishop*, 11 Verm. 198.

persons cannot prescribe for an easement, though they may plead a custom.(1)

16. A custom to take a profit *in alieno solo* is bad. Such right can be claimed only by prescription, if at all.

17. Thus a custom, for the inhabitant landholders of a parish to dig or take, from closes adjoining the sea-shore, sand drifted to them from the shore, is void; 1. Because, the sand becoming part of the soil, it is a custom to take profits *in alieno solo*; 2. Because of uncertainty, the sand not being distinguishable from the soil. So a custom for all the citizens of the State to take seaweed thrown upon the shore.(2)

18. A right to *store lumber* is a *profit in another's soil*, that must be prescribed for in a *que estate*,(a) and cannot be claimed by custom.(3) So a claim of a right to pile and deposit wood, &c., upon another's land, at pleasure, is a claim of an interest or profit in the soil.(4)

19. The same evidence does not authorize a finding of a customary right in all the occupiers within a district, and a prescriptive right to the same thing in respect to a particular estate within the district. A custom for *all the inhabitants* of a parish to play at games, &c., in the close of A, at all seasonable times, is good. But not a custom for all persons *for the time being in said parish*.(5)(b)

20. If the existence of a custom at a distant time is shown, and there is no proof of its non-existence at any certain time, a jury may infer that it went back to the reign of Richard I, or the time of legal memory.(6)

21. A right in the occupant of an ancient messuage, to water his cattle at a pond, and take the water for domestic uses, is an easement, not a profit *a prendre* in another's soil.(7)

21 a. It is not an unreasonable custom, that a tenant, who is bound to use and cultivate his farm according to the rules of good husbandry and the custom of the country, should be entitled, on quitting the farm, to charge his landlord with a certain portion of the expense of necessary drainage, done without his landlord's consent or knowledge.(c)(8) So a custom of a particular place, for the owner of a lot of land, after giving notice to the owner of an adjoining lot to build his half of a partition fence, and his refusal to do so, to build the whole, and hold the

(1) 2 John. 362; Co. Lit. 113 b; 4 Rep. 31; 3 Cruise, 309.

(2) Blewitt v. Tregonning, 5 Nev. & Man. 234; Grimstead v. Marlowe, 4 T. R. 717; Kenyon v. Nichols, 1 R. I. 106. See Fletcher v. Sukell, 2, 267.

(3) Ackerman v. Shelp, 3 Halst. 130; 6 Co. 59 b.

(4) Littlefield v. Maxwell, 31 Maine, 134.

(5) Blewitt v. Tregonning, 5 Nev. & M. 308; Fitch v. Rawling, 2 H. Bl. 393; Fitch v. Fitch, 2 Esp. 543.

(6) Leuckhart v. Cooper, 7 Car. & P. 119.

(7) Manning v. Wasdale, 5 Ad. & Ell. 758.

See Bailey v. Appleyard, 8 Ad. & Ell. 161.

(8) Mousley v. Ludlam, 9 Eng. Law and Eq. 119.

(a) See sec. 22.

(b) Averment of a lost grant from the owner of a beach to a town, to the use of its inhabitants, to take seaweed for manuring their lands. The evidence was, that individual inhabitants had been accustomed, from an early period, to take seaweed for such purpose. Held, the above averment was not proved. Sale v. Pratt, 19 Pick. 191.

(c) Where parol evidence was offered to prove a custom of a place, by which all leases expired at a certain time; held, the lease itself must first be proved, and then any incident to it could be shown by parol evidence; but incidents could not be first proved, to establish the contract. Moore v. Eason, 11 Ired. 568.

party refusing for his share of the expense, is a reasonable and just custom, and may be enforced.(1)

22. Prescription is either a *personal* right, exercised by one and his ancestors, or by a corporation and their predecessors, and called a prescription *in the person*; or else it is attached to the ownership of a certain estate, and called a prescription in a *que estate*. The latter must always be laid in the owner of the fee, even though set up by one claiming a particular estate; because the nature and commencement of the interest of the latter clearly negatives any immemorial occupancy. Hence he must prescribe, if at all, *under cover* of the tenant in fee.(2)

23. Prescription is said to be wholly a usage *in pais*, and therefore does not apply to rights which originate by *matter of record*, as, in England, to *deodands*. So also it applies only to such things as might lawfully be the subjects of a grant, reservation or deed; being founded upon the supposition of a grant, once made, but now lost.(a) But, on the other hand, prescription does not lie for anything in a *que estate*, which lies in grant; but only for a thing claimed in a man and his ancestors, because he comes in by descent, without deed.(3)

24. From modern usage, a jury may infer an immemorial right, in the absence of contrary evidence.(4)

25. Where one pleads a right by prescription *que estate*, as, for instance, a right of common, and the plaintiff traverses such right, and produces an ancient grant of a right of common, without date; this is not conclusive against the plea, because the grant may be either prior to the time of memory, or made merely in confirmation of an antecedent prescription. And this is a question for the jury.(5)

26. Prescription *que estate* applies only to that which is appendant or appurtenant to land.(6)

27. By the English law, the time whereof the memory of man, &c., necessary to raise a prescriptive title, dates from the commencement of Rich. I.(7)(b)

28. *The memory of man* is said to be twofold, viz., by proof, as by record or other writing, and by a man's own proper knowledge. Hence a prescriptive claim is negated by any writing to the contrary, though there be nothing opposed to it within the memory of any living man. And hence, in England, if there is any proof of the commence-

(1) Knox v. Artman, 3 Rich. 283.

(2) 6 Rep. 60 a.

(3) Co. Lit. 114 a; 5 Rep. 109 b; Potter v. North, 1 Vent. 387.

(4) Jenkins v. Harvey, 1 Cromp. M. & R. 877.

(5) Addington v. Clode, 2 Bl. R. 989; Co.

Lit. 121 a. (See Rust v. Boston, &c., 6 Pick. 158.)

(6) Lit. 183.

(7) Lit. 170; Co. Lit. 115 a; 2 Bl. Com. 31.

(a) So an act, limiting the period for claims under the State, and founded upon the presumption of a former grant from the State, does not apply, where it is evident that no such grant could have issued. Troxler v. Gibson, 1 Hayw. 468-9.

(b) By St. 2 & 3 Wm. IV, c. 71, the period of legal memory is thus limited: in cases of rights of common or other benefits arising out of lands, except tithes, rents and services, *prima facie* to 3 years, and conclusively to 60 years, unless proved to have been held by consent, expressed by deed or other writing; in cases of aquatic rights, ways and other easements, *prima facie* to 20 years, and conclusively to 40 years, unless proved in like manner by written evidence to have been enjoyed by the owner's consent; and in cases of lights, conclusively to 20 years, unless proved in like manner to have been enjoyed by consent. 1 Greenl. on Ev. 77, n.

ment or origin of a right since the time of Richard I, it cannot be prescribed for.(1)

29. Prescription is supported by proof of the enjoyment of a profit *a prendre*, by the owners and occupants of an estate, within living memory, without proof of user or non-user previously. But, to establish a *lost grant*, a user must be presumptively shown to have commenced at the time of such grant.(2)

30. In Missouri, it is held, there shall be no prescription, short of thirty years, unless the title commenced fairly and formally.(3)

31. Prescription requires continued, (a) adverse (b) and peaceable usage and enjoyment. But a title once gained in this way is not lost by an interruption of the use for ten or twenty years. Thus, where one, having a prescriptive right of common, takes a lease of the land upon which it is charged, for twenty years, merely the enjoyment of the prescriptive right is suspended, and it revives at the end of the term.(4)(c)

32. In Missouri, it is said, the enjoyment must be uninterrupted, peaceable, public and unequivocal, by one who is master, or has good reason to think himself so.(5)

33. Prescription must be *certain*. Thus, a prescription to pay for tithes a penny, *or thereabouts*, for an acre, is bad. So, a custom for *poor and indigent householders*, living in A, to cut and carry away the rotten boughs and branches in a chase in A, is bad, for uncertainty of the persons. So a prescription for the right, every year, and at all times of the year, to put and turn the party's cattle into and upon a certain close, is bad for uncertainty. So it must be *reasonable*. Thus a prescription for setting out tithes, without the view of the parson, is void for unreasonableness. But it may be unusual or inconvenient; as, for a way through a church, or churchyard. It cannot be for a wrong or nuisance; (d) as, for instance, to lay and keep logs upon the highway.

(1) Co. Lit. 115 a; Pringe v. Child, 2 Rolle's Abr. 269.

(2) Blewett v. Tregonning, 5 Nev. & M. 308.

(3) Salle v. Primm, 3 Misso. 529.

(4) Co. Lit. 113 b; Clay v. Thackeray, 2 Moo. & R. 244. See Reed v. Earnhart, 10 Ired. 516.

(5) Salle v. Primm, 3 Misso. 529; Bailey v. Appleyard, 8 Ad. & Ell. 161.

(a) The question may arise, what constitutes the commencement of adverse use. Action for the obstruction of a water-course, by the erection of a dam below the plaintiff's mill. The defendant claimed a right, by prescription, to raise the water, in the manner and to the height alleged. Held, the time while his dam was in the course of being erected, and before it was so far completed, as to permanently raise the water and set it back upon the plaintiff's premises, was not to be included in the duration of the use from which the prescriptive right was claimed. Branch v. Doane, 17 Conn. 402.

(b) Where a defendant in execution remains in possession of the land sold, his possession is not necessarily permissive, and he is not estopped from claiming, that his possession was adverse to the purchasers, which, continued for twenty years, will give him a good title. Chaitin v. Malone, 9 B. Mon. 496.

(c) Thirty years' enjoyment will give a prescriptive title, though interrupted, if there be an intervening estate for life. Clayton v. Corby, 2 Ad. & Ell. (N. S.) 813. Where an island, subject to overflow, and to whose enjoyment no enclosure was necessary, was continuously used by the defendant for pasturage, whenever it was safe to use it, for twenty years; held, such a possession as would bar any other claimant; but that the limitation of seven years under the laws of Kentucky would not apply, as there was no actual settlement. Webbs v. Hynes, 9 B. Mon. 388.

(d) Action for nuisance, arising from *mizen* upon defendant's land, which adjoined the plaintiff's. Held, a plea of prescription by twenty years' use was bad, because it alleged only that bad smells had proceeded from the source referred to, not that they had reached the premises of the plaintiff. Flight v. Thomas, 10 Ad. & Ell. 590. See Bliss v. Hall, 5 Mann. & G. 500. Simmons v. Cornell, 1 R. I. 519.

So, it is said, where possession *commenced in wrong*, this rebuts the presumption of a grant, and no prescription arises; as where there was an *encroachment*, in case of common.(1)

34. One cannot prescribe for that which the law gives of *common right*; as, in England, the lord of a manor for a court-baron.(2) (See ch. 60, sec. 8.)

35. So there can be no presumption of grant, and therefore no prescription, in case of a *common privilege*; as where one pastures his cattle upon a common, or a road kept open for public use. So, where a highway has been laid out along a beach, and it has been used as common by fishermen, fowlers and haymakers, no individual can set up a prescriptive right.(3)

36. Presumption of a grant cannot arise against an infant or *feme covert*.(4)

37. There can be no prescription against an act of Parliament, which is the highest proof and matter of record in law, unless the prescription is saved by another act. It is said, however, by Lord Coke, that an *affirmative* act does not *take away a custom*; and a custom or prescription may be set up against even a *negative* act, which merely declares or affirms the common law, as, for instance, an act against cutting trees in one's own forest, without the view of the forester. Mr. Hargrave adopts the same doctrine, remarking, that to say a statute was merely declaratory of the common law, and yet introduced a new law, or operated on subjects which the common law did not, was a contradiction: but that where a negative statute is not merely declaratory of the common law, but intended to annihilate all particular customs, clashing with it, the construction would undoubtedly be different. Lord Coke's distinction, however, between declaratory negative acts and others, has been denied.(5)

38. In the United States, neither individuals, nor aggregate bodies, nor the government itself, can prescribe against the rights of the citizen, with respect to any privilege secured by the constitution. So, possession and use will not give an individual or a corporation a title to a franchise, which is an encroachment on a public right. But possession for thirty-five years, under an act of the legislature, gives a good title, though the act be unconstitutional.(6)

39. One prescription cannot be set up against another, for both are equally ancient. Thus, if one man prescribes for a way, another cannot prescribe for a right to prevent the enjoyment of it.(7)

40. A prescription may be lost by *unity of possession*, of as high and perdurable an estate in the thing claimed, and in the land out of which it is claimed; because it is an interruption in the right.(8)

41. A prescription is lost by destruction of the thing to which it pertains. Thus, a prescription for the repair of a castle ceases with the destruction of the latter. But not by alteration in the *quality* of the

(1) 2 Rolle's Abr. 265; *Wilson v. Carlile*, Hob. 107; *Selby v. Robinson*, 2 T. R. 758; *Dewell v. Sanders*, Cro. Jac. 491; *Ib.* 446; *Bradbee v. Governors, &c.*, 2 Dowl. P. C. 164; *Edwards v. Edwards*, 2 Y. & Coll. 123; 8 Ad. & Ell. 161; *Hilton v. Granville*, 4 Beav. 130.
(2) *Pill v. Towers*, Cro. Eliz. 791.
(3) *First Parish, &c. v. Beach*, 2 Pick. 60, n.; *Thomas v. Marshfield*, 13, 240.

(4) 2 Day, 527.
(5) Co. Lit. 115 a and n.; *W. Jones*, 270-1-89.
(6) *Baker v. Fales*, 16 Mass. 488; *Doe v. Trustees*, 2 Hawks, 233; *Penny, &c. v. Philadelphia*, 4 Harr. 79.
(7) *Aldred's case*, 9 Rep. 57; 2 Mod. 105.
(8) Co. Lit. 114 b; 4 Rep. 88.

thing; as where a *park*, the tithes of which one has prescribed for, is *disparked*; for the land remains. So, where one has *estovers* by prescription, for a house, in which he makes alterations, without making new chimneys, or otherwise injuring the owner of the wood; the right is not lost. And even where new chimneys are made, or an addition to the house, the prescription, though not accordingly enlarged, remains good for the old erections. So, where a fulling-mill was pulled down, and a grist-mill built in its place, as it caused no injury, the prescription was held to continue in relation to the water-course.(1)

42. A matter in writing determines a matter *in fait*. Thus, if one having *liberties*, in England, by prescription, take a patent of them from the king, the prescription ceases.(2)

43. A prescription may be lost by non-user. (See *Way, Easement*.)

44. With regard to the *descent* of a right by prescription; if claimed by one *and his ancestors*, it passes as an *ancestral estate*; if claimed in a *que estate*, it accompanies the course of the estate to which it is annexed. In neither case does it stand on the footing of a *purchased estate*; prescription being considered rather an evidence of a former acquisition, than an acquisition *de novo*.(3)

45. The common law principles relating to prescription and custom are undoubtedly, in general, adopted into American law; with some unavoidable modifications, however, *as to time*, which will be briefly noticed.

46. A colonial ordinance of 1644, in Massachusetts, provided that no custom or prescription should prevail in *any moral case*, or "to maintain anything that could be proved to be morally sinful by the word of God."(4)

47. In a recent case in Massachusetts, it was contended, that, as the time of legal memory, by the common law, extends back to the commencement of the reign of Rich. I, no prescriptive right, founded on immemorial usage, can be here maintained. In reference to this argument, Wilde, J., remarks, that, for all practical purposes, the date of legal prescription might as well be reckoned *from the time of the creation*, as from the period mentioned. The limitation in question was founded on an equitable construction of the Statute of Westminster, (13 Edw. I, c. 39,) limiting a writ of right to a seizin from the time of Rich. I. The same period of possession, which gave a title to land, was held also to give a title to easements. Hence, when St. 32 Hen. VIII, reduced the former period to sixty years, the latter, both upon the ground of consistency, and to quiet possessions, should also have been reduced. Of this opinion was Rolle, (2 Abr. 269,) though at his time the practice was otherwise. But, though the change referred to was not made, yet the courts, in analogy to the statute of limitations of ejectment, adopted the rule, by which a jury is both authorized and required to *presume a grant* from an enjoyment for twenty years, not upon the ground that such grant is actually supposed to have been made, but for the purpose of quieting possessions. The presumption of a grant is the foundation of the doctrine of prescription. The distinction is, that in the latter case the grant is presumed by the court, or rather by the law, and in

(1) Cowper v. Andrews, Hob. 39; 4 Rep. 87 a; Luttrell's case, 4 Rep. 86.

(2) Finch, b. 1, ch. 3, sec. 23.

(3) 2 Bl. Com. 266.

(4) Anc. Char. 177; 8 Pick. 511.

the former by the jury, under the direction of the court. But both are substantially *legal presumptions*, depending on pure legal rules. These considerations account for the fact, that in England no reduction has taken place in the period of legal prescription. The courts in this country had the same right to adopt the English rule of prescription, with a modification suited to the situation of the country, which the courts in England had to establish the rule itself; and the better opinion is, that our time of legal memory was limited to sixty years, and did not extend to a period beyond which no memory or record goes.(1)(a)

48. In a later case in Massachusetts, upon substantially the same grounds, the period of prescription has been reduced to *forty* years; a change corresponding with that made in the Statute of Limitations.(2)

49. And, it is said, the court will generally measure the period of prescription by the statute of limitations. It is accordingly fixed, in Connecticut and Vermont, at fifteen years; in South Carolina, five years. Chancellor Kent remarks, that, in general, the period is the same in this country as in England.(3) In New York, time out of mind, or legal memory, for the purpose of supporting a prescription, previously to 1830, was twenty-five years, and is now twenty years.(4)

50. But, in New Jersey, it is held that the rules of the common law, relating to custom and prescription, had never been *practised* upon in that State, and therefore were not adopted by the constitution. No instance has occurred of a right established on these grounds; and the fact, that the country was not settled by civilized inhabitants till more than three hundred years after the reign of Richard I, shows the impossibility of adopting the common law rule. If this rule prevailed as to rights by *custom*, the numerous lots upon navigable rivers, which have not been as yet wanted for agricultural or commercial purposes, and over which the inhabitants have been used to drive their cattle to water, must forever remain unimproved. It is admitted, however, that the use of an easement for thirty or twenty years, or even a less time, may be left to the jury as evidence, under all the circumstances, to presume a grant or dedication.(5)

51. So, in Pennsylvania, it has been held, that a legal prescription cannot exist in that State, *the memory of man* being reckoned from a period of such remote antiquity; but the doctrine of *presumption*, though not an *absolute* bar, like the statute of limitations, is a *presumptive* bar for the jury. Sixty years' adverse possession, therefore, gives a good title. It is held to be matter of law, and the court are bound to give an opinion, what circumstances will justify the presumption of a deed.(6)

52. In Massachusetts, the Revised Statutes require twenty years' uninterrupted use to give title to any easement. And the owner of the land may prevent the acquisition thereof, by serving upon the other

(1) Coolidge v. Learned, 8 Pick. 504. (See 3 Dane, 253; Candler v. Lunsford, 4 Dev. & B. 407.

(2) Melvin v. Whiting, 10 Pick. 295; Thomas v. Marshfield, 13, 248.

(3) Ricard v. Williams, 7 Wheat. 110; 6 Conn. 289; Martin v. Bigelow, 2 Aik. 184;

Anderson v. Gilbert, 1 Bay, 375; 3 Kent, 441, n.

(4) Miller v. Garlock, 8 Barb. 153.

(5) Ackerman v. Shelp, 3 Halst. 130-1.

(6) Young v. Collins, 2 Browne, 292; Stoeper v. Whitman, 6 Binn. 416.

(a) The presumption of a grant does not arise, till the party, against whom it is made, has a right of action. McCorry v. King, 3 Humph. 267.

party a written notice, in the form prescribed, to be recorded within three months, expressing his intention to dispute such title. This notice constitutes an *interruption*, and prevents the gaining of a right by subsequent user, for any length of time. The party claiming the easement may treat the notice as a disturbance of his right, and bring an action accordingly. By a late act, (1851, 687,) when the owner is unknown, notice may be posted on the premises, and a copy served upon the person last assessed. Substantially the same provision is made in Maine and Indiana, and probably some other States.(1)(a)

CHAPTER LXXVI.

STATUTES OF LIMITATIONS.

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| <ol style="list-style-type: none"> 1. General remarks; analogy and distinction between limitation and prescription. 5. Periods of limitation by successive statutes. 6. Heirs in tail, when barred—<i>formedon</i>. 8. Entry, how limited; <i>descent cast</i>; possession must be adverse. 13. Reversioners, &c.; whether within the statutes. 18. Possession, when not adverse. 19. New right of entry. 20. Whether different possessions may be joined, to give an adverse title. | <ol style="list-style-type: none"> 21. Statute does not apply to dower and waste. 22. Action, when necessary after entry. 23. <i>Disabilities</i>, general principles concerning. 38. Must be expressly provided for; not regarded by the common law. 40. To what persons and things the statutes apply. 43. Do not apply to the government. 44. Whether applicable in equity. 50. Statutes of limitation in the United States. |
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1. ANALOGOUS to a *positive* title by prescription, which, it has been seen, is sometimes held exclusively applicable to *incorporeal* interests, is the *negative* title arising from the possession of real estate for a certain period, after which, by virtue of express *statutes of limitation*, an adverse claimant is allowed no *remedy* to recover it from the possessor. It will be seen at once, that, although these respective titles are founded upon different principles, the former pertaining to *the right itself*, the latter to *the legal means of enforcing* such right; yet the practical effect of both is precisely the same; for a right, which the law provides no means to enforce, must be regarded as having no legal existence. It is said, the statutes of limitation operate as an extinguishment of the remedy of the one party, not as giving the estate to the other.(2) But Lord Mansfield, speaking of the action of ejectment, says, that the plaintiff must always show a right to enter, by proving possession within twenty years, or accounting for the want of it under some of the statutory exceptions. Twenty years' adverse possession is a *posi-*

(1) Mass. Rev. St. 412, 698; Me. Rev. St. 622-3; Ind. Rev. Sts. 259. (2) 3 Cruise, 314.

(a) The Rev. Sts. of Maine, (c. 147, sec. 14,) providing that no easement shall be acquired by adverse use, except for twenty years, uninterrupted, was not intended to give any rights such as are therein specified, or to determine how they might be acquired, but to prevent their acquisition without certain prescribed conditions. *Pierre v. Fernald*, 26 Maine, 436.

tive title to the defendant. It is not a bar to the action or remedy only, but takes away the plaintiff's right of possession. Every plaintiff in ejectment must show a right of possession; therefore the defendant need not plead the statute, as in case of actions.(1)(a)

2. It is said, in cases where the statutes of limitation apply, a title is not created merely by virtue of possession; but the design is, to exclude all objections to a title which is *prima facie* good, and which has long so remained, without claim or controversy. And the lapse of time is regarded not only as a dereliction of all grounds of objection, but as a protection against ingenious attempts to frustrate an unexceptionable title by the intromission of claims, whose injustice it is very difficult to detect and expose. It is the tendency of time to obscure and extinguish the direct evidence of title. Statutes of limitation are meant to cure this defect, and supply the want of such evidence; or to repair the injuries committed by time.(2)(b)

3. The distinction between *positive* prescription, and that which consists in the taking away of the *remedy* by positive statutes, is important for its bearing upon the *constitutionality* of laws. Statutes of limitation are ordinarily *prospective* only. But where they are not so, they rather establish that a certain lapse of time shall amount to evidence of the transfer of property, than actually to take it away. A statute of limitation, however, which should *wholly* deprive a party of any remedy, would undoubtedly be a violation of the express constitutional provisions in favor of private property.(3)

4. It is said, the doctrine of presumptive rights applies to those cases, for which the statute of limitations has not provided.(4)

5. Anciently, the demandant in a real action was required to allege a seizin from the reign of Hen. I;(c) by St. of Merton, 20 Hen. III, from the time of Hen. II; and by St. Westmin. 1, 3 Edw. I, c. 59, from that of Rich. I. At length Statutes 32 Hen. VIII, c. 2,(d) and 21

(1) Taylor v. Horde, 1 Burr. 60. See 11 Gill & J. 373.

(2) Ang. on Limit. 27-8.

(3) Gospel Society v. Wheeler, 2 Galli. 105; 3 Dall. 386; 7 John. 477; 12 Wheat.

349; Call v. Hagger, 8 Mass. 423; 1 Paine, 559; 2 Mas. 169; 3 N. H. 473; 1 Blac. 36; Swearingen v. U. S., 11 Gill & J. 373.

(4) 1 Verm. 53.

(a) Mr. Angell remarks, that St. 4 Hen. VII, in relation to *fines*, is of the nature of *positive* prescription. Ang. on Limit. 18.

(b) The consideration, that, after twenty years' possession, one may himself have an action against a stranger, who ejects him, seems to render almost unmeaning the distinction between positive and negative prescription. In Pennsylvania, twenty-one years' possession is held to give a *positive title*, and ejectment lies thereupon. Pederick v. Searle, 5 S. & R. 240. (See Porter v. Perkins, 5 Mass. 233; Davis v. Mason, 4 Pick. 156; Shumway v. Simons, 1 Verm. 53.) But, in Tennessee, a naked occupation for seven years, under a claim of ownership, without title, or writing purporting to convey title, vests the occupier with a mere right of possession, which is a defence to a possessory action, but is not alienable, descendible, or liable to execution. Crutsinger v. Catron, 10 Humph. 24. See Wynn v. Lee, 5 Geo. 217.

If a disseizor surrender possession to the disseizee before acquiring a perfect title, he puts an end to his claim. But after occupying long enough to acquire a title under the statute of limitations, such title can be divested only by deed. Winthrop v. Benson, 31 Maine, 381.

(c) Mr. Angell says, in allusion to Bracton's remark, that all actions with certain times have a limitation, and Lord Coke's comment upon it, that the limitation was by force of acts of Parliament; there was anciently a stated time for an heir to claim after the death of his ancestor; else he was himself without remedy. The time fixed was a year and a day.

(d) This statute, (sec. 2,) never adopted in Maryland. Pancoast v. Addison, 1 Har. & J. 356. See Statute 2 & 3 Wm. IV, ch. 71.

Jac. 1, c. 16, were passed, for the purpose of quieting titles and avoiding suits; and were thence called *statutes of repose*. The former provided, that no writ of right should be brought, or claim or prescription made, for any lands, &c., or other hereditaments, upon the seizin of an ancestor or predecessor, unless such seizin was within sixty years before test of the writ, (or, upon one's own seizin, within thirty years.) (a) The latter provided, that writs of *formedon*, in *descender*, &c., should be brought within twenty years next after the title and cause of action first descended or fallen, saving, however, to an infant, *feme covert*, *non compos*, person imprisoned, or beyond seas, or to his heirs, the right of suing within ten years from removal of such disability, or from his death under disability. (1)(b)

6. It seems, under the latter act, if one entitled to an estate tail neglects to bring his writ of *formedon* within twenty years after his title first descends, both he and his issue are barred; though it has been doubted, whether the issue are barred, because they claim, not as his issue, but of the first donee, *per formam doni*. (2) It has been held in Massachusetts and Rhode Island, that when the statute has once begun to run against an heir in tail, no subsequent disability can interrupt it; and, after twenty years, no *formedon* can be maintained. (3)

7. Such writ in *remainder*, &c., may be brought within twenty years from the termination of an estate tail, however long it may have lasted. (4)

8. By the last mentioned statute, the right of entry is limited to twenty years, with a saving of all disabilities. But, it is said, if ejectment be brought within that time, no entry is necessary. (5)

9. By the St. of Hen. VIII, entry may be made after the death of a disseizor, unless he had peaceable possession five years next after the disseizin. But this act, being penal, has been held not to extend to *abators* or *intruders*, (c) or to any *grantee* of a disseizor, mediate or immediate. So, where an heir enters upon land devised, the devisee may still enter, having no other remedy. It is said, the doctrine that a descent cast *tolls* (or takes away) entry, does not seem to apply in any case, where the party has no other remedy than by entry. (6)(d)

(1) Co. Lit. 114 b; 2 Inst. 94, 238; 3 Cruise, 314-15-16; Dally v. King, 1 H. Bl. 1; Co. Lit. 15 b; 3 Rep. 41 b; 1 P. Wms. 721; 2 Ves. 634; Plow. 374; Leonard v. Leonard, 10 Mass. 281; Nase v. Peck, 3 John. Cas. 128.

(2) Stowell v. Zouch, Plow. 374; Murray v. E. Ind. Co., 5 B. & A. 215; Tolson v. Kay, 3 Brod. & B. 217.

(3) Dow v. Warren, 6 Mass. 328; Inman v. Barnes, 2 Galli. 315.

(4) 3 Cruise, 317.

(5) 1 Saun. 319, n.; (4 Cranch, 367; 13 John. 229; 10 Mass. 93.)

(6) Carter v. Task, 1 Salk. 241; Co. Lit. 256 a, 238 a; Co. Lit. 240 b; Ang. on Lim. 62; Doe v. Staple, 5 T. R. 684.

(a) Mr. Angell remarks upon this provision of the statute, that it has generally passed without notice. He supposes, that where a disseizee has been barred by the lapse of thirty years, and dies, his heirs are also barred.

(b) A tenant in tail in 1793, made a feoffment of the lands entailed, and received none of the profits of the lands up to his death in 1831. Held, his issue in tail was entitled to his writ of *formedon* within twenty years from the tenant's death. Kannon v. Rimington, 10 Eng. L. & Equ. 477.

(c) *Abatement*, is where an owner dies, and a stranger enters before the heir or devisee. *Intrusion*, is where a particular estate terminates, and a stranger enters before the reversioner, &c. In Massachusetts, it has been recently decided, that the statute applies to all cases of disseizin; not merely to actual expulsions. Tolman v. Sparhawk, 5 Met. 469.

(d) In Maine, a descent does not defeat the right of entry. Rev. St. 610.

10. In Maryland, it is held, that ejectment lies after a descent cast, though there is no right of entry.(1)

11. Twenty years' possession gives a *right of entry*. Thus, the party, if turned out, may enter, and bring an ejectment. But the statute of limitations gives no title, unless possession has been adverse.(2)(a)

12. Where one has conveyed to trustees for himself, for a special purpose, and remains in possession; such possession is not adverse, but he is a tenant at will.(3) (See *Trust*, Vol. I, ch. 24.)

13. It has already been seen (ch. 52) that the statute of limitations does not run against reversioners, &c.(b) The same rule applies, where one has, by mistake, been allowed to hold as tenant for life. Nor, in case of lease, is a reversioner, &c., bringing ejectment, bound to show, in support of his title, that he has received any rent. The Statute of James imposes no such condition, but provides for an entry, and consequently an ejectment, which is founded upon entry, within twenty years *after a title accrues*; and the reversioner's title does not accrue till the lease is ended. If no rent has been received, the same statute takes away the *remedy* for it, by action of debt, after six years; but the *right* remains. It is unnecessary to prove a title to the rent; a title to the *possession* is sufficient. Non-receipt of rent, in the line of descent in which the plaintiff claims, may perhaps be left to the jury, to disprove his right, and is open to be rebutted by other proof; but receipt of rent is not an essential part of the plaintiff's case.(4)

14. It has been further held, that even an adverse receipt of rent, by a third person, does not bring a reversioner within the operation of the statute. Thus, where lands under lease are devised, and after the testator's death his heir receives the rent for twenty years; even though the lease contains a clause for re-entry upon non-payment of rent, the

(1) *Mockbee v. Clagett*, 2 H. & McHen. 1. So in Ohio. 3 Ohio, 237.

(2) *Stocker v. Burney*, 1 Ld. Ray. 741; 2 Salk. 421; *Smith v. Lorillard*, 10 John. 357; *Jackson v. Dysling*, 2 Caines, 198; *Ruggles v. Keeler*, 3 John. 267; *Cowp.* 597; 18 John. 40; *Fanning v. Wilcox*, 3 Day, 258; *McRae v. Smith*, 2 Bay, 339; *Eakin v. Raub*, 12 S. & R. 334; *Denn v. White*, 1 Coxe, 94.

(3) 3 Cruise, 320; *Keene v. Deardon*, 8 E. 248; *Rush v. Barr*, 1 Watts, 110; *Lyon v.*

Marclay, Ib. 271; *Terrill v. Murry*, 4 Yerg. 104; *Wallace v. Duffield*, 2 S. & R. 527; *Whart. Dig.* 420.)

(4) *Smirall v. Graham*, 1 Dana, 574. See *Thomas' Co. Lit.* 252, n. u.; *Wells v. Prince*, 9 Mass. 508; *Jackson v. Johnson*, 5 Cow. 74; *Heath v. White*, 5 Conn. 228; *Hall v. Vandegrift*, 3 Binn. 374; 1 Jac. & W. 512; *Orrell v. Maddox*, *Runn. Eject. App.* No. 1; 3 Cruise, 320-1; *Grout v. Townsend*, 2 Hill, 554.

(a) A party who has positively disclaimed both title and possession, for a period sufficient to give effect to the statute of limitations, is estopped from denying that the possession of the opposite party has been actual and adverse. *Gregg v. Blackmore*, Pen. Sup. C. Sept. T. -40; *Law Rep.* Feb. -41, p. 371.

But the statute does not run against the true owner, who has a perfect paper title, in favor of the party in actual possession, who disclaims any claim or title. *English v. Register*, 7 Geo. 387.

Land was conveyed to A, a married woman, who paid part of the consideration from her own earnings, with the knowledge and assent of B, her husband. A, having died without issue, B remained in possession, and conveyed the land, stating that it belonged to A, and that he had enough land left to answer any damages. He had sometimes said the land was his, and his neighbors never heard him say the contrary. Held, he had gained no title by adverse possession. *Marshall v. Pierce*, 12 N. H. 127.

(b) It seems, however, this exception applies only to the remedies of entry and ejectment; and that a writ of right must be brought within sixty years from the *seizin of the ancestor*, and not from the death of tenant for life. Ang. 40. *Widdowson v. Harrington*, 1 J. & Walk. 512. See *Chadwick v. Broadwood*, 3 Beav. 308.

devisee may have ejectment after the lease expires. It has been contended, that in such case the devisee might have entered for the mere purpose of asserting and preserving his title, without disturbing the possession of the lessee; or have brought a writ of entry for the same purpose, in which the judgment is for *seizin* without saying anything about *possession*; or distrained for the rent, or entered for condition broken; that the statute of limitations had always been construed favorably to quiet possession; and that the question which had been raised, whether a receipt of rent for twenty years, by one tenant in common, was an ouster of the other, implied that an ouster might consist in such receipt. But these positions were overruled.(1)(a)

15. But where a lease is void, the statute of limitations runs against the reversioner; as, where it is made by a tenant for life, to continue after his death, by virtue of a power, but not conformably thereto, not being executed or consented to by the intended lessee, never having been out of the lessor's hand, not reserving the best rent, nor containing any covenant to pay the rent.(b) So, where the lease has terminated by the legal construction of its intention and object, though not according to its literal terms, the statute begins to run, such intention qualifying the grant, and amounting to a limitation. As, where the only cause of a lease for lives was to preserve the reversion during an estate tail; and therefore the lease ended, during the lives, with the latter estate. So where the lease is a mere trust, and disposed of as such, to attend the inheritance of the reversioner. In such case, the lease is one of his muniments; a mere weapon in his hands; and cannot take from an adverse possession the benefit of the statute. The surrender of such lease might be presumed, to let in the statute of limitations.(2)

16. It is said, that where boundaries are disputed, the agreement of a tenant for life, adjusting them, will be evidence to bind the remainderman, if without fraud.(3)

17. Where land is sold on condition to revert upon the happening of a contingency, if the reservation be valid, the statute of limitation does not run against the reversioner till the contingency happens.(4)

18. It has been remarked, (sec. 11,) that the statute of limitations, like a positive prescription, does not run, where the possession of one not the true owner is not *adverse* to him, but *amicable*, or *permissive*. The question has already been summarily considered, what sort of possession is necessary to constitute a *disseizin*.(c) (1. ch. 2,) Connected, in

(1) Doe v. Danvers, 7 E. 299. See 1 Burr. 113; Holdfast v. Shepard, 6 Ired. 361.

(2) Taylor v. Horde, 1 Burr. 60; 6 Bro. Parl. 633.

(3) Saunders v. Annesley, 2 Sch. & Lef. 101.

(4) Betty v. Moore, 1 Dana, 236.

(a) In a late case it has been held, that where rent is reserved upon a lease, non-payment thereof gives adverse possession, as much as payment to a third person. Jones, 4 Y. & Coll. 466. But see Doe v. Oxenham, 7 Mees. & W. 131.

(b) Lord Mansfield calls such a lease, "this pocket undelivered grant of the ideal, incorporeal freehold."

(c) See 3 Nev. & M. 331; Whitton v. Peacock, 3 My. & K. 325; 4 Nev. & M. 308, 477; Doe v. Branstons, 3 Ad. & El 67; Doe v. Edgar, 2 Bing. N. R. 498; Doe v. Wing, 6 Car. & P. 538. Also, for precise definitions of adverse possession, 1 Smith, (Maine) 377; 2 N. Y. Rev. St. 294.

It has been held, that, under the statute of limitations in Georgia, which is copied (except as to time) from the act of Jac. I, no entry is necessary within the period prescribed,

one point of view, with the same general subject, is the law relating to the *estoppel* between landlord and tenant, which prevents the latter from denying the title of the former, and his possession from being adverse to the landlord, and which has also been briefly treated of. (a)(1) (1. 228.) Other important modifications of the general rule of adverse possession, are found in the case of mortgagor and mortgagee, (b) and in that of joint tenants and tenants in common; and these too have been concisely noticed in the preceding volume. (2)(c) (Chs. 31, 54.)

19. It is a maxim, "*quando dua jura in una persona concurrunt, æquum est ac si essent diversis.*" Hence, where a man gains a new right, he is allowed a new period of twenty years to pursue his remedy. (3)

20. It is held that a purchaser, without notice, even by parol, may join his adverse possession to the ostensible adverse possession of his vendor, so as to avail himself of the statute. Thus, a purchaser from a devisee of the land. If the possession of the vendor and purchaser, and that of those claiming under them, put together, amount to the time limited, and have not been interrupted, the true owner is barred. And it seems to have been held, in Pennsylvania, that where the defendant sets up a possession, and shows a possession in A, he may give evidence that A held adversely to the plaintiff, without first proving the connection of A's possession with his own. But in another case, Washington, J., thought it perfectly clear, that where different persons enter upon land in succession, each occupying for a period short of the time limited, the last possessor, who may be the defendant, cannot tack the possession of his predecessors to his own, so as to make out a sufficient continuity of possession to bar the entry of the owner. (4)(d)

(1) See *Barber v. Root*, 10 Mass. 260; *Gwynn v. Jones*, 2 Gill & J. 173; *Jackson v. Johnson*, 5 Cow. 74. 'Twenty years' possession, after renouncing the landlord's title, is a bar. *Ogden v. Walker*, 6 Dana, 425. Otherwise, where the tenant obtains an adverse title, and holds under it. *Chambers v. Pleak*, 1b. 431.

(2) See *Chapman v. Gray*, 15 Mass. 439; *Lodge v. Patterson*, 3 Watts, 74; *Terrill v. Murry*, 4 Yerg. 104; *Lloyd v. Gordon*, 2 Har. & McHen. 254; *Johnson v. Howard*, 1 Ibid.

281; *Smilie v. Biffle*, 2 Barr, 52.

(3) 3 Cruise, 327; *Hunt v. Bourne*, 1 Salk. 339; *Green v. Rivett*, 2. 421.

(4) Ang. on Lim. 88-9; *Cunningham v. Patton*, 6 Barr, 355; *Caston v. Caston*, 2 Rich. Equ. 1; *Alexander v. Pendleton*, 8 Cranch. 462; *Overfield v. Christie*, 7 S. & R. 173; *Jackson v. Moore*, 13 John. 518; *McKoy v. Dickinson*, &c., 5 S. & R. 254; *Potts v. Gilbert*, 3 Wash. 475; *Chilton v. Wilson*, 9 Humph. 399; *Moore v. Collishaw*, 10 Barr, 224.

unless there be an adverse possession. *Shearman v. Irvine*, 4 Cranch, 367. A mere declaration of adverse possession, though with notice to the rightful owner, gives no right of action; and therefore the statute does not run from such declaration. *Shepley v. Lytle*, 6 Watts, 500; *Abell v. Harris*, 11 Gill & J. 367. Possession without color of title does not bar an adverse claim. A devise or deed is held to give color of title. *Borrets v. Turner*, 1 Tayl. 112; *Den v. Turner*, 1 Mur. 141; *Stanly v. Turner*, Cam. & Nor. 533; *Patton v. Hynes*, Cooke, 356.

(a) Where a tenant disclaims his landlord's title, the statute begins to run from the time of notice of such disclaimer. *Bullard v. Copps*, 2 Humph. 409. It begins to run in favor of a tenant, in respect to his liability for *mesne profits*, from the time of his surrender of possession. *Doe v. Jones*, 6 B. Mon. 388. In New York, (Code, ch. 2, § 3, 82,) the possession of a tenant is that of the landlord, till 20 years after the tenancy expires. If there is no lease, 20 years from payment of rent, though the tenant has another title.

(b) See *Doe v. Surtees*, 5 Barn. & A. 687; *Christophers v. Sparke*, 2 Jac. & W. 234; *Cholmondeley v. Clinton*, 1b. 179; *Joyner v. Vincent*, 4 Dev. & B 512.

(c) A mortgagee was in possession six years, without acknowledgment of the mortgagor's title. Having bought out the interest of a tenant for life of the equity, he occupied twenty years more. Held, during the tenancy for life, his possession was not adverse, and the reversioner might redeem; *Hyde v. Dallaway*, 2 Hare, 528.

(d) Where there are successive occupants of land, of which a party is disseized, he will

21. Statute 32 Henry VIII, extends to all writs, in the nature of a writ of right, in which the demandant must allege seizin, and seeks to recover an hereditament. But it does not apply, where he does not count upon his own or his ancestor's seizin, as in *dower*; (see 1, 176-7, and *infra*, sec. 33;) nor to *waste*, where the land is not directly in demand.(1)

22. By St. 4 Anne, c. 16, an entry, or claim, is insufficient to avoid the statute of limitations, unless followed, within one year, by an action, which is prosecuted with effect.(a)

23. The *disabilities*, mentioned in the statute of limitations, must exist when the right first accrues. The burden of proof is upon the plaintiff to bring himself within the exception. After showing this, the exception is presumed to continue till proved to have ceased. If the time once begins to run, no subsequent or *cumulative* disability will avail.(b) It is said, a distinction in this respect was once attempted to be made between *voluntary* and involuntary disabilities; and it was contended that insanity, for instance, occurring after the statute had begun to run, would stop its progress. But this distinction has been overruled.(2)

24. A died, leaving a son B, and a daughter C, minors; and a stranger entered upon the land. B soon afterwards went to sea, and was supposed to have died abroad, under age. Held, C's right of entry continued only ten years from the death of B; it being more than twenty years in the whole since the death of A, who was last seized.(3)

25. Mr. Preston is of opinion, that where one is under disability, when his right first accrues, the statute will not run against him, till he is free from disability; and successive disabilities, without any in-

(1) Ang. 33; Hitchcock v. Harrington, 6 John. 290; Moore v. Frost, 3 N. H. 126.

(2) Walden v. Gratz, 1 Wheat. 292; Gregg v. Sayre, 8 Pet. 244; Rankin v. Tenbrook, 6 Watts, 388; Dekay v. Darrach, 2 Green, (N. J.) 288; 2 Ohio, 339; Guion v. Bradley, 4 Yerg. 232; Dow v. Warren, 6 Mass. 328; Hudson v. Hudson, 6 Munf. 352; Den v. Mulford, 1 Hayw. 311; 3 Cruise,

330; Smith v. Clark, 1 Wils. 134; Angell, 147-8; Lessee, &c. v. Westenhaver, (Ohio,) Law. Rep. March, 1842, p. 437; Downing v. Ford, 9 Dana, 392; Phillips v. Sinclair, 7 Shepl. 269; Stevenson v. McReary, 12 S. & M. 9; Davis v. Sullivan, 2 Eng. 449.

(3) Doe v. Jesson, 6 E. 80; Cottrell v. Dutton, 4 Taun. 826.

not be barred, unless there is some privity or connection among them. It will be sufficient, however, if the original disseisor made a lease, and the lessee retains possession till the lessor's death, and afterwards as tenant at will or at sufferance of the disseizee. *Melvin v. Prop'rs, &c.*, 5 Met. 15; *Wade v. Lindsey*, 6, 407.

Where a claim was maintained upon an uninterrupted possession of forty years; held, the death of the original holder and subsequent reception of rent by his widow did not break the continuity of possession, she being liable to account for the rent to the heirs. *Reed v. Proprietors, &c.*, 8 How. U. S. 274. The question of continuity of possession, where the evidence lies in parol, is for the jury. *Cunningham v. Patton*, 6 Barr, 355.

Twenty years' adverse and uninterrupted use by A of land adjoining his farm, gives him a possessory title to, or easement in, such land. But such possession by A's grantor, while a mere tenant at will of the farm, cannot be tacked to the possession of A, in order to make out the twenty years, though his grantor conveyed the farm to him with all the privileges and appurtenances. *Plumer v. Brown*, 8 Met. 578.

The occupation of an intestate and his administratrix cannot be tacked together. The title must pass *by contract* from one occupant to the other. But holding under a grantee, to whom an occupant has conveyed in fraud of creditors, is not adverse. *Bullen v. Arnold*, 31 Maine, 583.

(a) This act was never re-enacted or adopted in Massachusetts. *Stearns*, 47.

(b) A different doctrine seems to have been formerly adopted in South Carolina; but it is now overruled. *Rose v. Daniel*, (cited) 1 N. & McCord, 296; *Faysoux v. Prather*, *Ib.*

termination, will continue a protection to him. That is, if the successive disabilities are *in the same person* on whom the right first descended, he may enter within the statutory time from removal of *the last* disability. This principle has been recognized in Maryland, but denied in Massachusetts, New York and Connecticut. Thus, where one was an infant when her title first accrued, and, before coming of age, married; it was held that the coverture was no protection. So the heirs of a married woman must bring their suit within ten years after her death; though one also a *feme covert* at the death of her mother.(1)

26. Where several disabilities exist together, in the same person, when the adverse possession begins, the right of action continues ten years after removal of the last. Thus, where one, who was both *non compos* and out of the kingdom, returns to the kingdom, and again leaves it, continuing *non compos*; though his privilege arising from absence is lost, the other continues, till he regains his reason. So, where an infant female marries, the statute does not run against her till removal of both disabilities.(2)

27. The saving, in case of disability, has no practical application, unless a longer time than ten years elapses, between the accruing of the cause of action, and the removal of the disability. Thus, where the disability is removed five years after the cause of action accrues, the party is not allowed fifteen years to make up the full twenty, and ten in addition, on account of the disability; but only fifteen in all. If twenty years have elapsed since the right of action first accrued, and ten of them free from disability, he is barred.(3)

28. The word *death*, in the Statute of James, refers to the person to whom the right *first accrued*. Hence, where such person dies, under disability, his heirs are not to be allowed twenty years, as being the time from the accruing of their title, and ten years in addition; but only the latter period from the ancestor's death, even though twenty years had elapsed from the accruing of his title. A different construction would lead to great inconveniences, by the dying of parents and children under age, or the continuance of other successive disabilities.(4)(a)

(1) Prest. on Abs. 340; Dugan v. Gittings, 3 Gill, 138; Carpenter v. Schermerhorn, 2 Barb. Ch. 314; (1 Shepl. 397;) Eager v. Commonwealth, 4 Mass. 182; Demarest v. Wynkoop, 3 John. Ch. 129; Bunce v. Wolcott, 2 Conn. 27; (4 Day, 298; Griswold v. Butler, 3 Conn. 227.)
(2) Butler v. Howe, 1 Shepl. 397; Sturt v. Mellish, 2 Atk. 610; Plow. 375; 3 John. Ch. 129; Eaton v. Sanford, 2 Day, 523; Ark. Rev. St. 53.
(3) Smith v. Burtis, 9 John. 174; Demarest v. Wynkoop, 3 John. Ch. 129; Jackson v. Johnson, 5 Cow. 74.
(4) Doe v. Jesson, 6 E. 80. (See Stowel v. Zouch, Plow. 353;) Shep. Touch. 31; 2 Prest. Abs. 341; 3 Thos. Co. Lit. 18, n. 1.

(a) The above doctrine seems to be well settled; though Lord Mansfield, in one case, held to a different construction. Similar ground was once taken in Connecticut. Coterell v. Dutton, 4 Taun. 826; Eaton v. Sanford, 2 Day, 523. But these cases may be considered as now overruled.

So, in Mississippi, cumulative disabilities are not allowed. Dease v. Jones, 23 Miss. (1 Cush.) 133.

So, in South Carolina, Starke v. Starke, 3 Rich. 438; and Tennessee, Guion v. Anderson, 8 Humph. 292.

So, in Tennessee, where a plaintiff in ejectment claimed to avoid a deed made by her, while an infant and a *feme covert*; held, that these disabilities could have no effect upon each other, nor the one derive any aid from the other. Scott v. Buchanan, 11 Humph. 468.

29. In Pennsylvania, it is held, that an infant is not allowed ten years after the lapse of twenty-one years from the commencement of adverse possession. He can never have more than thirty-one years, nor less than twenty-one. Circumstances may fix an intermediate period. In Kentucky, where one dies after the statute has begun to run against him, leaving infant heirs, they are allowed the full statutory time, after coming of age.(1)

30. Where a particular estate intervenes, the right of a person under disability may be saved, which would otherwise be lost.(2)

31. An adverse possession of lands commenced in 1772, when A was tenant by the curtesy, the reversion in fee being in B, his daughter, who was an infant. In 1783, B married C. In 1784, A died, and C in 1807; and then B brings ejectment for the land. Held, B, though of age at the termination of the particular estate, was not then bound to assert her right, being a *feme covert*; that, during the particular estate, no right of entry descended to her, and the statute did not begin to run till A's death; and that the coverture was not a second, or cumulative, but the first disability.(3)

32. Ejectment, by the grandchildren of one who died seized. At the decease of the grandfather, the mother of the plaintiffs, through whom the estate came to them, was a *feme covert*. The action was brought within ten years from the death of the plaintiff's father, who had held as tenant by the curtesy. Held, it was not barred.(4)

33. Where a husband conveys his land without the wife's joining in the deed, the statute of limitations does not run against her till after his death. So, where husband and wife joined in a deed which was void for informality as to her, and she brought a suit long after his death; held, the grantee's possession was not adverse. Otherwise, it seems, where an entry and possession are adverse to his title, or where his title is not acknowledged. And where, in 1777, a wife joined her husband in a deed, but did not legally acknowledge it, the court in Pennsylvania held, in 1810, that she was barred of her dower. (See sec. 21.) Twenty years' possession adverse to a *feme covert* bars the title of her husband.(5)(a)

(1) Weddle v. Robinson, 6 Watts, 486.

(2) Machin v. May, 4 Bibb, 43.

(3) Jackson v. Sellick, 8 John. 262; 5 Cow. 74; Jackson v. Schoonmaker, 4 John. 390.

(4) Moore v. Jackson, 4 Wend. 59.

(5) Cullen v. Motzer, 13 S. & R. 356; Bingham's case, 2 Co. 93; Lampet's case,

10, 49; Edward Seymour's case, Ib. 99; Twisse v. Cotton, Hob. 365; Kirk v. Dean, 2 Binn. 341; Moore v. Frost, 3 N. H. 126; Smith v. Shackelford, 9 Dana, 475; Downing v. Ford, Ib. 392; Taylor v. Sherwell, 4 B. Mon. 578; McCorry v. King, 3 Humph. 267; Hassell, 3 Y. & Coll. 617.

(a) Partition of land held in common with a married woman cannot be presumed from lapse of time; and there can be no presumption against her in relation to her real estate, because she is incapable of contracting, except in the mode prescribed by law. Perry v. Calhoun, 8 Humph. 551.

Where the operation of the act commences upon the land of a woman during her coverture, who dies leaving her husband; it is suspended, until the husband's tenancy by the curtesy is expended or merged. Marple v. Myers, 2 Jones, 122.

Where there is an adverse possession of land, in North Carolina, belonging to a *feme covert*, and the period of seven years from the time of the ouster expires in the lifetime of the husband, she has three years only after the death of the husband within which to commence her suit; but when the seven years do not expire within the lifetime of her husband, she has the remainder of the full period of seven years from the time of the ouster, or three

34. Where one of tenants in common, disseized, is under disability, this does not protect the others. So, it seems, if an estate descend to parceners, one of whom is under disability, which lasts more than twenty years; the other must still enter within this period, or will be barred. In such case the party not barred must sue alone.(1)(a)

35. Where a disseizor enters upon land belonging to a *feme covert*, this is an ouster of both husband and wife, and a right of entry immediately accrues to both. If the disseizor had held under the husband, the wife would have had no right to enter, nor could she enter against the will of the husband; but with his consent, express or implied, she had a right to enter. Her right of entry, as against the disseizor, is perfect, though in the exercise of it she is under the husband's control. The latter circumstance does not prevent such right; if it did, no right of entry could descend or accrue to a *feme covert*, and the saving clauses in the statute would be nugatory. A right of entry may descend or accrue to her, and her entry will be lawful, provided the husband does not expressly disagree, for his consent is presumed, it being for his advantage.(2)

36. In a recent case in Connecticut, the question arose, whether, after fifteen years' adverse possession of land belonging to a *feme covert*, she and her husband could maintain a joint action to recover it; or whether the husband's right of action was not wholly barred by the statute of limitations. A majority of the court held, that, as the husband was joined in the suit from necessity, and as his claim was for a mere incidental right, growing out of the coverture, the action might be maintained by the parties jointly, and was not limited to the wife alone after removal of her disability. Church and Williams, Justices, dissented, upon the ground that the husband had the entire

(1) Doolittle v. Blakesly, 4 Day, 465; Jackson v. Bradt, 2 Caines, 169; Jackson v. Sample, 1 Mur. 577; 3 Ohio, 60.
(2) Melvin v. Proprietors, &c., 16 Pick. 167.

years from the time of her husband's death, whichever shall be the longer period, within which to commence her suit. Crump v. Thompson, 9 Ired. 491.

Where a husband and wife unite in a deed of the lands of the wife, which is not so acknowledged and certified as to pass the wife's right, and possession is taken under the deed; she has no cause of action during the life of the husband, and therefore no statute of limitations operates upon her right until after his death. Gill v. Fauntleroy, 8 B. Mon. 177.

Conveyance by a husband of his wife's land, with warranty, the wife joining in *relinquishment of her dower*. The purchaser, and those claiming under him, occupied and exercised acts of ownership on the land more than twenty-nine years, without claim or interruption by the wife or her heirs. Held, the facts did not authorize the presumption of a grant from her or her heirs, and that the heirs were not estopped to deny the husband's ownership in fee at the time of the conveyance. Raymond v. Holden, 2 Cush. 264.

(a) In Kentucky, it has been held, that a joint tenant is barred, but not a tenant in common. 1 Marsh. 39; 4 Bibb, 412. The members of two societies occupied a field adjoining their common house of worship, for the fastening of their horses, during seventy years. A member of one society directed his executors, to sell all the land of which he was "lawfully seized at his death," the societies having been then in possession for more than twenty years; under which power, a part of the common land was sold, and the purchaser erected a wall cutting it off. Held, the long possession had given the societies a good title to the land occupied, as tenants in common, and one of them had a right to bring their action of trespass after there had been an ouster, which was the case here, as the testator was not lawfully seized of the part which had been sold. As it was claimed that this was sold for a graveyard, the plaintiffs were allowed to prove that they had offered to give a lot of land for that purpose, to show that there was no necessity for the encroachment. Trauger v. Sassaman, 2 Harris, 514.

control of the freehold during coverture, might convey it for his own life, and that an adverse possession was as effectual to bar his title as a deed would be.(1)

37. Where a judgment was rendered, and a *hab. fac.* issued, against a husband, and land of the wife delivered up thereupon; held, she might enter, the husband not objecting, for the purpose of preventing the statutory bar to her right of entry.(2)

38. Although the disabilities referred to are founded upon the most obvious considerations of reason and justice; viz., the mental inability of the party to understand and enforce his rights, as in the case of infants, &c.; want of legal freedom to act, as in that of a *feme covert*; or ignorance of one's own title, arising from absence; yet, it seems to be the prevailing doctrine, that no exceptions from the statute of limitations would be *implied* upon these grounds, if the statute were in its terms general. The doctrine of any *inherent equity*, creating an exception as to any disability, where the statute creates none, has been long and uniformly exploded.(3) So, where a statute provided, that no one should enter upon lands but within twenty years after his title first accrued, or, in case of disability, "within ten years after the expiration of the said twenty years aforesaid;" it was held, that the language was wholly unambiguous, and did not admit of the construction, that, in case of disability, the right should continue ten years after its removal; and that the contrary literal interpretation was not unreasonable, because the bar applied only to entry, and not to other remedies.(4)

39. But in Connecticut it has been stated, as a principle of the *common law*, that a statute shall not apply to persons under disability, unless specially named.(5)

40. Ecclesiastical corporations, and ecclesiastical persons seized in right of their churches, as they cannot alienate to bind their successors, are also excepted from the statute of limitations, and cannot bind their successors, but only themselves, by neglecting to sue for their lands within the prescribed period.(6)

41. Customary and prescriptive *rents* are within the statute,(a) being properly proved by seizin. Otherwise with a rent created by deed, of which the commencement can be shown. In the former case, an avowant is driven to allege a seizin, but in the latter the deed is the title, and no seizin is material. The words of the act are, "no man shall make avowry and allege seizin" after fifty years: intending to limit a time for the seizin, when it is required by law to be alleged; not to compel such allegation, where seizin was not necessary before.(7)

(1) *Watson v. Watson*, 10 Conn. 77. See *Doe v. Plumtre*, 3 Barn. & Ald. 474; *Hulm v. Heylock*, Cro. Car. 200.

(2) *Melvin v. Propr's, &c.*, 5 Met. 15.

(3) *Beckford v. Wade*, 17 Ves. 86; *Demarest v. Wynkoop*, 3 John. Ch. 129.

(4) *Melvin v. Propr's, &c.*, 16 Pick. 168, 169.

(5) *Eaton v. Sanford*, 2 Day, 527.

(6) 3 Cruise, 331; *Stowell v. Zouch*, Plow. 358.

(7) Co. Lit. 115 a; 2 Vern. 235; *Stackhouse v. Bernston*, 10 Ves. 467; *Foster's case*, 8 Rep. 64; 4 Co. 11 a; Ang. 33; *Grant v. Ellis*, 9 Mees & W. 113.

(a) The St. of Hen. VIII, sec. 4, limits the right of alleging seizin of any rent, to fifty years. Where twenty years have elapsed, without any demand of a ground rent, the jury may presume payment, &c.; but circumstances may repel the presumption. *St. Mary's, &c. v. Miles*, 1 Whart. 229.

42. But where *the amount* of a rent is not ascertained by the deed; as where it is to be such as the party reserving it pays over, not expressing what that is, and the latter did not commence by deed; the statute of limitations applies, seizin being equally necessary to both rents.(1)

43. At common law, no prescription lies against *the king*: "*nullum tempus occurrit regi.*" And the St. of Hen. VIII was held not to apply to him or to his lessee, who might bring ejectment for his term, though out of possession for twenty years. But by Statutes 21 Jas. I, c. 2, and 9 Geo. III, c. 16, the lapse of sixty years is a bar to any claim of the crown. In Massachusetts, it is said, that no *laches* can be imputed to the government, and against it no time runs so as to bar its rights. (But see secs. 50, 57, 58, 59, 63.) So, in Maryland, the statute of limitations did not run against the *Lord Proprietary*.(a) The principle has also been recognized in Tennessee, Pennsylvania,(b) Illinois

(1) Co. Lit. 115 a, n.; Collins v. Goodall, 2 Vern. 235.

(a) But it has been since held, that the State is barred by lapse of time. Hepburn, 3 Bland, 110. See Swearingen v. U. S., 11 Gill & J. 373. The principle stated in the text has been held applicable to a controversy in equity between the independent States of Massachusetts and Rhode Island, in relation to *boundary*. The Supreme Court of the United States suggest in their opinion, that allowance is to be made for the usually slow movement of political communities; and for the considerations, that the country, at the first settlement, was wild, the mistake, if any, not likely to be discovered till grants were made, and the tribunal to be resorted to, situated abroad. 15 Pet. 233. In Delaware, the State shall not be barred by 20 years' possession of salt marsh, beach or shore. Rev. Sts. 3.

So it is held, that thirty years' possession will not give title as against the State. Walls v. McGee, 4 Harring. 108.

So, the Georgia statute of limitations does not run against the tenant in possession, while the title is in the State. Smead v. Williams, 6 Geo. 158.

So, in Illinois, a limitation of twenty years' possession of land, purchased from the United States, will not begin to run, until after the purchase. Spellman v. Curtenius, 12 Ill. 409.

An action by the people to recover lands is not barred, it seems, by the New York statute of limitations (1 R. L. 184, sec. 1,) unless there has been an adverse possession of forty years. The People v. Arnold, 4 Comst. 508.

But an action brought by the attorney-general, in the name of the people, to annul letters patent, is within the statute of limitations, and will be barred by an adverse possession of forty years. The People v. Clarke, 10 Barb. 120.

Whatever will constitute an adverse possession, within the meaning of the New York Revised Statutes, (2 R. S. 292, sec. 9 to 12,) if continued forty years, under the acts of 1788, or 1801, gives to the person in possession a perfect title as against the people. Ib.

In pleading the statute in an action by the people, it is sufficient to say, according to the language thereof in substance, that the title of the people did not accrue within the space of forty years before the commencement of suit, and that neither the people, nor those under whom they claim, have received the rents and profits within forty years. The People v. Arnold, 4 Comst. 508.

Such a plea or answer, it seems, amounts to an allegation, that the lands have been held in hostility to the title of the plaintiffs. Ib.

The people, it seems, are deemed to have received the rents and profits so as to prevent the running of the statute, unless the lands are held in hostility to their title. Ib.

So, although the lands are wild and uncultivated, or occupied by one who makes no return for the use, provided he holds by permission of the people, and in subordination to their title. Ib.

(b) But here it is also formally decided, that an *improver* holds *under*, not adversely to, the State. So one claiming by warrant and survey. Morris v. Thomas, 5 Bin. 71; M'Coy v. Trustees, &c., 4 S. & R. 305-6.

and Kentucky. But the State may *elect* to consider itself disseized.(1)(a)

44. Although the statutes of limitation, by their terms, are applicable only to suits at law,(b) yet, upon the principle of public convenience and utility, the rules established by them have been adopted in courts of equity; more especially where a party would have a concurrent remedy at law and in Chancery. It was remarked by Lord Camden, that when the legislature had fixed a time at law, it would have been preposterous for equity, which *by its own proper authority always maintained a limitation*, to countenance laches beyond this period.(c) The application of the principle has already been stated in regard to mortgages, (Vol. I. See sec. 58,) and the distinction, with relation to it, pointed out, in the case of trusts, between controversies with third persons, and those of the trustee and *cestui* themselves.(2) (Vol. I.)

45. It is evident, that where a trustee and *cestui* are both out of possession, the adverse occupant acquires a good title against both.(3)

(1) *Lee v. Norris*, Cro. Eliz. 331; *Run. Eject.* 59; *Hall v. Gittings*, 2 H. & John. 112; *Inhabitants, &c. v. Baker*, 4 Mass. 528; *Cheney v. Ringgold*, 2 H. & J. 87; *Johnston v. Irwin*, 3 S. & R. 292; 4 Bibb, 62; *Holbrook v. Holbrook*, 3 Shepl. 9; *Miller v. Lindsey*, 1 McL. 33; *Singleton v. Ake*, 3 Humph. 626; *City, &c. v. Illinois, &c.*, 12 Illin. 38; *Smith v. Calloway*, 7 Blackf. 86; *Com. v. Hutchinson*, 10 Barr, 466; *Moody v. Fleming*, 4 Geo. 115.

(2) *Dewdney*, 15 Ves. 496; *Stackhouse v. Barnston*, 10, 466; 1 Vern. 256; *Totherby v. Hartridge*, 2 Vern. 21; *Jones v. Tuberville*, 2 Ves. 11; *Smith v. Clay*, 3 Bro. 639, n.; *Gilbert v. Emerton*, 2 Vern. 503; *Mackenzie v. Powis*, 7 Bro. Parl. 282; 2 Cha. Ca. 217; *Watkins v. Harwood*, 2 Gill & J. 307; 6 Ohio,

97; 1 Marsh. 519; 3 Litt. 183; *Humbert v. Rector, &c.*, 8 Paige, 195; *Tiernan v. Rescaver*, 10 Gill & J. 217; *Crutcher v. Trabue*, 5 Dana, 82; *Thruston v. Masterson*, 9, 235; *Gates v. Jacob*, 1 B. Monr. 308; *Erwin v. Ware*, 2, 65; *Mitchell v. Thompson*, 1 McL. 105; *Bowman v. Wathen*, 2, 396; *Piatt v. Vattier*, 1, 164; *Scott v. Evans*, Ib. 486; *Heirs, &c. v. Brush*, Ibid. 533; *Holland v. Clark*, 1 Y. & Coll. Cha. 151; *Coppin v. Gray*, Ib. 205; *Vickers v. Oliver*, Ib. 211; *Harpending v. Dutch, &c.*, 16 Pet. 456; *Phillips v. Sinclair*, 7 Shepl. 269; *Chapman v. Butler*, 9, 191; *Ferson v. Sanger*, Davies, 252; *Sindall v. Campbell*, 7 Gill, 66.

(3) *Hawley v. Cramer*, 4 Cow. 717; *Williams v. Otey*, 8 Humph. 563.

(a) Although a party cannot, perhaps, hold against the State by continued possession, yet, if the State quit-claim to A land in possession of B, B will be allowed for the *betterments*. *Kinsman v. Greene*, 4 Shepl. 60.

(b) In Tennessee, they are also binding in equity. *Terrill v. Murry*, 4 Yerg. 104. The same principle has been adopted by the Supreme Court of the United States. *U. S. Bank v. Daniels*, 12 Pet. 32; *Coulson v. Walton*, 9, 62. But the statute of limitations of Indiana does not run for or against an equitable title. *Baird v. Wolfe*, 4 McL. 552.

So, in Connecticut, it is said, that generally courts of equity consider the statutes of limitations as obligatory upon them when they are called upon to enforce only legal rights. *Phalen v. Clark*, 19 Conn. 421.

In North Carolina, equity can no more disregard a statute of limitation and repose, than a court of law. *Bailey v. Carter*, 7 Ired. Eq. 282.

So in Delaware, where the statute of limitations bars the legal remedy, the remedy in equity is held barred by analogy; and, independently of acts of limitation, a court of equity will refuse to aid a stale demand, on the ground of laches and public policy, as well as on a presumption of payment. *Perkins v. Cartmell*, 4 Harring. 270.

But when equity acts in analogy to the statutes of limitation, it adopts the exceptions also. Ib.

(c) "There are cases, in which the statutes would be a bar at law, but in which equity would, notwithstanding, grant relief; and, on the other hand, there are cases where the statutes would not be a bar at law, but where equity, notwithstanding, would refuse relief. But all these cases stand on special circumstances, which courts of equity can take notice of, when courts of law may be bound by the positive bar of the statutes." 1 Story on Equ. (3d ed.) 73-4. Under some circumstances, it is said, even a shorter period than that of legal limitation may operate as a bar in equity. *Piatt v. Vattier*, 1 McL. 164; *Scott v. Evans*, Ib. 486.

46. Equity is not bound to treat any period short of twenty years as an absolute bar to a suit respecting real property.(1) The defence avails only in favor of the party who sets it up.(2) Being only in analogy to the plea of the statute of limitations at law; it cannot be allowed in favor of one partner in possession of real estate, purchased with partnership funds, against the other, for the possession of one is the possession of both.(3)

47. Where a bill in equity, for discovery of title and relief, alleges *fraud*, the defendant cannot plead the statute of limitations as to the discovery, but must answer the fraud. A plea of the statute amounts to a demurrer, resting the defence upon facts of the plaintiff's own showing. Hence, the plaintiff would have no opportunity to reply to it.(4)(a)

48. So it is held in New York, that where a bill avers facts which take the case out of the statute, a pure plea of the statute is bad, unless accompanied by an answer which meets such averment.(5)

49. But mere concealment of a deed is no answer to the statute, for this would be a hard construction of a statute for quieting possessions. It must be an intentional concealment, or a voluntary and fraudulent detaining.(6)(b)

50. In Massachusetts, by provisions of the Revised Statutes, which are to take effect after December 31, 1839, the right of entry, and of action, is limited to twenty years after the right accrued to the party or those under whom he claims, or after the party, or those under whom he claims, have been seized; and this provision applies to the Commonwealth. In case of disseizin, the right accrues at the time of such disseizin. If the party claims as heir or devisee of one who died seized, his right accrues at the death of the latter, unless in case of curtesy, or other intervening estate; when the right accrues at the expiration of such estate, or at the time when it would have expired by its own limi-

(1) *Llewellyn v. Mackworth*, 15 Vin. 125.

(5) *Dixon v. Dixon*, 1 Maryland Ch. Decis. 271.

(4) *McGuire v. Ramsey*, 4 Eng. 518.

(4) *Bicknell v. Gough*, 3 Atk. 558. (See 1 Pick. 435; *First, &c. v. Field*, 3 Mass. 201; *Croft v. Arthur*, 3 Desaus. 223; *Rush v. Barr*, 1 Watts, 110; *Pennock v. Freeman*, Ib. 401; *Smith v. Bishop*, 9 Verm. 110; *Jones v. Conoway*, 4 Yeates, 109; *Peck v. Bullard*, 2 Humph. 41; 1 McL. 164, 486; *Pendergrast*

v. Foley, 8 Geo. 1; *Ferris v. Henderson*, 12 Penn. 49; *McKown v. Whitmore*, 31 Maine, 448; *Donnelly v. Donnelly*, 8 B. Mon. 113; *Conyers v. Kenans*, 4 Geo. 308.

(5) *Bloodgood v. Kane*, 8 Cow. 360. (But see *Allen v. Mille*, 17 Wend. 202.)

(6) 15 Vin. 125, pl. 8. See *Lexington, &c. v. Bridges*, 7 B. Mon. 556; *Harper v. Pope*, 9 Mis. 402; *Phalen v. Clark*, 19 Conn. 421.

(a) The case supposes that the bill itself alleges a claim barred by the statute, *but for the fraud*. See *Platt v. Vattier*, 1 McLean, 164; *Humbert v. Rector, &c.*, 24 Wend. 587; *Harrisburgh, &c. v. Forster*, 8 Watts, 13.

It has been recently held, that the statute, where the bill, upon its face, shows that the claim is barred, may be taken advantage of by demurrer. *Ingraham v. Regan*, 23 Miss. 213; *Swenson v. Walker*, 3 Texas, 93. See *Dickson v. Miller*, 11 S. & M. 594.

(b) In case of *mistake*, the statute runs from discovery thereof. *Brooksbank v. Smith*, 2 Y. & Coll. 58. Thus, as to the quantity of land sold. *Grundy v. Grundy*, 12 B. Mon. 269.

So, if a party is to be constituted a trustee by the decree of a court of equity on the ground of fraud, his possession will be considered adverse, from the time the circumstances of the fraud were discovered. *Harrison v. Adcock*, 8 Geo. 68.

The statute will run against an *insane* person who has conveyed his estate from the time of his restoration to sanity, and knowledge of the existence of the deed. *Dicken v. Johnson*, 7 Geo. 484.

tation. If there is such an intermediate estate, and in all cases where one claims by force of a remainder or reversion, the time of limitation is reckoned from the expiration of the intermediate estate by its own limitation, notwithstanding any forfeiture, for which entry might be made previously. But any person may enter, when entitled to do so by reason of forfeiture, or breach of condition; but where one claims under such title, his right accrues at the forfeiture or breach. Where any sole corporation is disseized, any of his successors may enter or sue within five years from his death, resignation or removal. In case of disability, (including absence from *the United States*,) ten years are allowed from its removal. Where the person first entitled dies under disability, and no determination or judgment has been had upon his title, ten years from his death are allowed to his representatives; but no further time for the disability of any other person. Entry shall not constitute legal *possession*, unless immediately followed by one year's open, continued and peaceable possession, or unless an action be brought upon such entry and seizin, within one year from ouster or dispossession. The limitation above provided, bars estates tail, and all remainders and reversions expectant thereupon. If a tenant or remainderman in tail dies within the period of limitation, no person, claiming any estate which such party might have barred, shall be allowed any longer time than the owner in tail would have had if he had lived. Where a person shall be under disability, on December 1, 1839, five years shall be allowed after its removal or the party's death, for the bringing of any action heretofore in use. No right of entry or of action shall be defeated by descent or discontinuance. Where an action abates by the demandant's death, or a judgment in his favor is for any cause annulled, one year is allowed for a new action.(1)(a) Writs of *right*, of *formedon*, and of *entry* are abolished, except as above and elsewhere provided.(2)(b)

51. Where the tenant in a real action, and those under whom he claims, have had possession six years immediately preceding, or under a title which he had reason to believe good, he shall be allowed for his improvements,(c) the value of which shall be paid before execution issues. On application of the plaintiff, the value of the land, without the improvements, shall be estimated, and he may elect to relinquish it to the tenant at such valuation; the amount to be paid in three annual instalments. And, on failure of payment, the plaintiff has execution for the land. The plaintiff's claim for rents and profits, (which by a new provision is allowed in the real action itself,) is to be fairly off set against the value of the improvements claimed as above.(3)

52. In Maine, by a former statute, after March 15, 1825,(d) writs of right, and all prescription, title and claim, upon the seizin of ancestors or predecessors, were limited to thirty years. Writs of entry, upon disseizin of ancestors, &c., or possessory actions upon their possession,

(1) Mass. Rev. St. 690-8.

(2) Ib. 616.

(3) Ib. 611-12-13-14. See *Howell v. Howell*, 2 My. & C. 478; *Jones v. Jones*, 4 Gill, 87.

(a) So in nearly all the other States, (*infra*.)

(b) By St. 1852, 891, a party in possession of real estate, to which an adverse claim is set up, may institute proceedings to test the validity of such claim. See Sts. 1854, 34.

(c) So in Wisconsin, Rev. Sts. ch. 107.

(d) This period is changed, with regard to some of the provisions, to April 2, 1843.

to twenty-five years. Actions upon the demandant's own seizin, writs of *formedon*, and rights of entry, to twenty years; with an allowance of ten years *after the expiration of twenty years*, in case of disability. If the owner die during such disability, his heir is allowed the same time. Where entry is made upon one who has had possession for six years, the latter may recover of the party entering, the value of his improvements.(1) Similar provisions are also made to those in Massachusetts, as to the allowance for improvements in an action for the land. They do not apply to cases of possession under a mortgage or contract.(a) In the same State, (by the Revised Statutes,) the period of limitation is fixed, for all cases, at twenty years. In case of a sole corporation, five years are allowed after the death of the incumbent actually disseized, though twenty had elapsed before.(2)

53. In New Hampshire, no one can enter, or have an action, prescription, or claim for real property, unless upon a seizin within twenty years; subject to the exception of disability arising from infancy, coverture and insanity; from the removal of which five years are allowed. If a defendant holds by a supposed legal title under a *bona fide* purchase, and he, or those under whom he claims, have possessed and improved the land more than six years; the jury shall assess the value of the improvements, which must be paid by the plaintiff to the clerk within one year, in order to entitle him to a writ of possession; otherwise his right is forever barred.(3)

54. In Vermont, the right of entry is limited to fifteen years; and, in case of disability, five from its removal. Absence beyond seas constitutes no disability. Allowance is made for improvements, if the defendant or those under whom he claims purchased, supposing the title good. No mesne profits can be recovered in ejectment, except upon the improvements. The provisions respecting betterments do not apply to one who entered under a contract with the owner, unless the latter has violated such contract. The statute does not affect the remedy against a *voucher*; but he may show, in mitigation of damages, the allowance made for betterments. If the demandant tender a warranty dèed to the defendant, no allowance is made for betterments, but the property is appraised; and the defendant allowed four years to pay the value of the land, in four instalments, the first in one year. The above provisions are declared inapplicable to future entries. Descent to an heir does not impair the right of action.(4)

55. In Rhode Island,(5) uninterrupted, quiet, peaceable and actual possession for twenty years, with a claim of ownership in fee-simple,

(1) 1 Smith, 375. See *Winthrop v. Benson*, 31 Maine, 381.

(2) *Ib.* 201. (See, also, *Ib.* 179;) *Me. Rev. St.* 612-14-15; 620-11; *Briggs v. Fiske*, 5 *Shepl.* 420; *Gilson v. Stetson*, 6, 428; *Comings v. Stuart*, 9 *Shepl.* 110; *Chapman v. But-*

ler, 191; *Varney v. Stevens*, 331; *Mason v. Walker*, 2 *Shepl.* 163; 4 *Ib.* 60.

(3) *N. H. L.* 74-5; *Rev. St.* 334, 384.

(4) 1 *Verm. L.* 280-90-1; 2 *Ib.* 57-8; *Verm. Rev. St.* 216-18, 305.

(5) *Ang. on Lim. Act.* 13.

(a) They apply, only where the tenant has been in actual possession by occupancy and improvement, six years before suit. *Bright v. Boyd*, 1 *Story R.* 478. Upon a bill for an account of rents, &c., against a *bona fide* tenant, after recovery of the land; he shall be allowed for improvements. So for payments made in discharge of incumbrances. *Ib.*

A plea of the general issue, with a claim for betterments, to a writ of entry, does not raise the question whether buildings on the land belong to the tenant. *Bullen v. Arnold*, 31 *Maine*, 583.

gives and makes a good title; subject to the right of any person under disability, to sue within ten years from its removal; and the right of a reversioner, &c., to sue within ten years from the accruing of his cause of action.

56. In Connecticut, the right of entry is limited to fifteen years; and an entry is of no effect unless a suit be brought thereupon within one year. In case of disability, the action may be brought or entry made, within five years from its removal, or, by the heirs of the party disabled, from his death. But *absence* is not a disability.(a) Where the statute begins to run, a supervenient disability will not stop it.(1)

57. In New York, the State limits its right of suing for real property to twenty years; excepting, however, any liberty or franchises. The right of a patentee or grantee of the State is subject to the same limitation. So, the right of the State, or of a subsequent grantee, to sue for lands previously granted, where the grant is declared void, is limited to twenty years from such judgment. No action lies for the recovery of real estate, but upon a seizin within twenty years; nor an *avowry* or *cognizance* of title to real estate, or to rents and services. No entry is valid as a claim, unless an action is brought within one year, and within twenty years from the accruing of the right of entry. A descent cast shall not affect the right of possession. Ten years are allowed from the removal of disability, or death of the party disabled, not including *absence*, and *imprisonment*, being confined to imprisonment on a criminal charge, or in execution upon conviction, for a term less than for life.(2)(b)

58. In New Jersey,(3) by Statute of 1787, sixty years' actual possession, continued by occupancy, descent, conveyance or otherwise, however commenced, vests a complete title, and constitutes a bar to any suit for recovery of the land. Thirty years' actual possession, if commenced or founded upon a proprietary right, duly laid thereon, and recorded according to law; or obtained by a fair *bona fide* purchase of one in possession, and supposed to have a title; is a bar to all prior locations, rights, &c., not followed by actual possession, and vests an absolute title. In both the above cases, five years are allowed for the bringing of an action after the removal of any disability. In the same State, by Statute of 1799, the right of entry is limited to twenty years; and also the right of action, after January 1, 1804. In case of insanity,

(1) Con. St. 361-2; 2 Conn. 27; 10, 77; (2) 2 N. Y. Rev. St. 292-5. Code, 1851, 5, 228; 3, 191; Rev. L. 404; Goodman v. Russ, 14 Conn. 210. 34; Willson v. Betts, 4 Denio, 201. (3) 1 N. J. Rev. L. 80.

(a) The time of a *defendant's* absence is not reckoned. Con. St. 363.

(b) But it is held, that if the period of limitation has begun to run against the ancestor, it will run against his heir, though under disability. Fleming v. Griswold, 3 Hill, 85.

The provision, requiring suits by heirs or devisees to be brought within ten years, applies, where the person originally entitled to sue is under a disability when the right accrues, and dies before such disability terminates, and thus casts the same estate, by devise or descent, upon heirs or devisees. Carpenter v. Schermerhorn, 2 Barb. Ch. 314.

Demandants in a writ of right must prove a seizin in themselves or their ancestors within twenty-five years; and it is sufficient to show a possession by their servant or tenant. Fosgate v. Herkimer, &c., 9 Barb. 237.

In an action of ejectment, brought in lieu of a writ of right, to enforce a claim which accrued before the Revised Statutes took effect, an adverse possession of twenty-five years must be shown in order to bar the action. Ib.

infancy or coverture, the period of such disability is not computed.(1) Possession by a mortgagee of any part of the land, for twenty years after breach of condition, is a bar to redemption. No action shall be brought by *the State*, after twenty years.(2)

59. In Pennsylvania, former statutes limited the right of entry and of action to twenty-one years, with an allowance of ten years from removal of disability, or death of the party disabled; including the absence of the defendant beyond sea; but, by a late act, the period is extended to forty years.(3) A different provision is made in regard to claims under the State, which may be noticed hereafter.(4)

60. In Delaware, twenty years' adverse possession is a bar. Infancy, coverture, want of understanding, or imprisonment, at the time a right of entry accrues, constitutes an exception, and the party may proceed to regain his right within ten years from the removal of such disability; or, if he die subject thereto, his heirs may have the same remedy which he would have had, if he had lived till the disability ceased.(4)

61. In Maryland, twenty years' adverse possession is a bar under St. 21 Jas. I, c. 16, which is in force in this State. The usual disabilities are excepted.(5)(b)

62. In Virginia, fifteen years are a bar to all writs of *formedon*, in descender, remainder, or reverter; also to all rights of entry. Five years are allowed to the party, after the removal of any disability, (*absence* not included,) and five years to his heirs after his dying disabled.(c) A writ of right, or other possessory action, may be brought upon the seizin of an ancestor, &c., within twenty-five years, and an action upon one's own seizin, within twenty years, with an allowance, in the latter case, of five years for disabilities. (The periods between April 12, 1774, and April 12, 1778, and between January 1, 1781, and January 5, 1782, and between May 5, and October 20, 1783, were formerly excepted from the time of limitation.)(6)

63. In North Carolina, an entry upon, or claim to lands, is limited to seven years; allowing three years from the removal of disability, or, in case of absence, eight years from the accruing of the claim. Possession under colorable title, for twenty-one years, bars the State.(7)(d)

(1) 1 N. J. Rev. L. 411.

(2) 1 N. J. Rev. L. 412.

(3) *Purd. Dig.* 583-5; *Penns. St.* 1842, 456. *Sts.* 1851, 615. See *Bensell v. Chancellor*, 5 *Whart.* 371; *Robb v. Bowen*, 9 *Barr*, 11; *Peppard v. Deal*, 9 *Barr*, 140.

(4) *Del. L.* 396-7; *Rev. Sts.* 439. See *Layton v. The State*, 4 *Harring.* 8.

(5) *Ang. (App.)* 23. See *Crawford v. Severson*, 5 *Gill*, 443.

(6) (1 *Vir. Rev. C.* 487, 488, 490.) (See 1 *Wash.* 302;) *Vir. L.* 1830, 98. (See also *St.* 1838, 20.)

(7) 1 *N. C. Rev. St.* 271, 272. See *Tyson v. Harrington*, 6 *Ired. Equ.* 329.

(a) Entry alone is sufficient to take a case out of the statute, without an action. *Altemus v. Campbell*, 9 *Watts*, 28.

(b) A continuous and uninterrupted possession for twenty years is necessary, in order to afford a presumption of a grant. *Casey v. Inloes*, 1 *Gill*, 430.

(c) *Cumulative* disabilities are not allowed. *Mercer v. Selden*, 1 *How.* 37.

(d) A took possession, in 1793, under color of title, of land previously granted to another, and died in 1794, leaving a will. B, a son of A, but not a devisee, took possession of the land in 1795, without color of title, and continued in the uninterrupted possession, exercising acts of ownership, for more than twenty years. Held, that B's title was perfected by such possession. *Smith v. Bryan*, 12 *Ired.* 11.

Held, also, that even if B was a trustee, under the will of A, for C, C could not dispute B's title, at law; much less could a stranger and a wrong-doer. *Ib.*

64. In South Carolina, writs of *formedon* and rights of entry were anciently limited to twenty years, with an allowance of ten years in addition from removal of disability.(1) By a statute of 1712, seven years' possession gives a good title; allowing to *femes covert*, persons imprisoned or out of the Province, three years from ratification of the act, and to infants two years after coming of age; and, if beyond seas, three years. By a provision which seems to make a subsequent part of the same act, five years is the period limited, allowing to *femes covert*, persons imprisoned or out of the Province, seven years *after their title accrues*, (to infants five years from coming of age, by Statute of 1788,) and to persons *non compotes* one year from the restoration of reason, or two years if out of the Province.(2) By a late act, the statute of limitations shall not defeat the rights of minors, when it has not barred the right in the life of the ancestor, before the accrual of the right of the minor. The time of limitation is extended from five to ten years.(3)(a)

65. In Georgia, seven years' possession is a bar to the right of entry and of action,(b) allowing three years from removal of disability; (not including *absence*.) No *claim* to lands is valid, unless made by action.(4)

66. In Alabama, the limitation is ten years, with five years after removal of the disability of infancy, coverture, or incapacity.(5)

67. In Mississippi, all entries and actions must be within twenty years, with a saving clause in favor of infants, *femes covert*, and insane persons. Fifty years' actual, uninterrupted possession gives a perfect title.(6)(c)

68. In Tennessee, seven years' possession of lands, &c., granted by this State or North Carolina, and held by deed, devise, grant, or other assurance, purporting to convey a fee-simple, gives an absolute title. And no person shall maintain a suit, in law or equity, for any lands, &c., after seven years from the cause of action accrued. Three years

(1) 2 Brev. Dig. 18, 19.

(2) 2 Brev. Dig. 20-1-4-5. See *Thompson v. Gaillard*, 3 Rich. 418; *Lavasse v. Lignier*, 1 Strobb. 326.

(3) S. C. St. 1824, 24.

(4) *Prince*, 573, 574, 575, 579. See *Carter v. Buchanan*, 9 Geo. 539; *Watkins v. Wool-*

folk, 5 Geo. 261; *Moody v. Fleming*, 4, 115; *Conyers v. Kenaus*, Ib. 308.

(5) *Clay*, 320; *Hallett v. Forest*, 8 Ala. 264; *Caldwell v. Thorp*, Ib. 253.

(6) *Missi. Rev. C. 183*. See *White v. Johnson*, 23 Miss. 68.

In North Carolina, a grant will only be presumed after thirty years' adverse possession. *Wallace v. Maxwell*, 10 Ired. 110. The statute runs against a claim for an account, for rents and profits, by one tenant in common against his co-tenant in possession. *Wagstaff v. Smith*, 4 Ired. Eq. 1.

(a) In this State, sixteen years' possession is, of itself, insufficient evidence for the presumption of a grant. *Anderson v. Hughes*, 5 Strobb. 74.

(b) Though the title of an adverse possession be ever so defective. *Beverly v. Burke*, 9 Geo. 440.

The title or cause of action does not accrue, until the land is granted by the State. *Smead v. Williams*, 6 Geo. 158.

More than seven years' notorious, peaceable, and adverse use and occupation of *gold mines*, where the party has gone into possession of the land under deed, will give a statutory right, notwithstanding the vendor has reserved the exclusive privilege of working the mines. *House v. Palmer*, 9 Geo. 497.

An adverse possession for seven years, under a deed purporting to convey an estate in fee-simple, though void in its inception, vests in the possessor, by virtue of the Tennessee act of 1819, c. 28, a valid title, in fee-simple, to the land, as against all persons not under disabilities. *Vance v. Johnson*, 10 Humph. 214.

(c) Thirty-two years' adverse possession before the commencement of an action, is a bar to the plaintiff's right, unless he can bring himself within some exception of the statute. *Montgomery v. Ives*, 13 S. & M. 161.

are allowed after the removal of any disability, or the death of a party disabled. But no cumulative disability shall prevent the bar of the statute, but only such disability as existed when the right to sue first accrued. A suit commenced shall not save the bar, unless prosecuted *with effect*. The act does not apply to lands reserved for *schools*.⁽¹⁾ Absence "beyond seas" is declared to mean, "out of the United States."^{(2)(a)}

69. In Kentucky, by statute of 1796, writs of *formedon* and the right of entry are limited to twenty years; writs of right upon the seizin of ancestors or predecessors, to fifty years; other possessory actions upon such seizin to forty years; and actions upon one's own seizin, to thirty years; with an allowance of ten years from removal of disability, including *absence from the State*. The same periods are excepted from the act, as in Virginia. (Lands held by patent, survey, &c., are specially provided for, and the provisions will be noticed hereafter.) By statute of 1814, *absence* is excluded from the list of disabilities; *femes covert*, claiming by descent or devise only, not by deed or contract, are allowed *three* years from becoming *discover*t, provided the property came to them after coverture; and infants, persons *non compos*tes, and imprisoned, only three years in all cases. By late acts, seven years' possession under colorable title is good against a mere prior possession. Married women are allowed seven years, after removal of the disability. Actions are limited to fifteen years, allowing three years after removal of disability. The time is not extended for a disability not existing when the right of action accrued. No action lies, in any case, after fifty years.^{(3)(b)}

70. In Ohio, twenty-one years' adverse possession is a bar, with the usual exception of disabilities; and where one is absent *from the State* when the action accrues, and remains absent at a place unknown to the plaintiff, the statute runs from his return. It is said by a late writer, that infancy, coverture, insanity and imprisonment, are the only disabilities. The statute of *occupying claimants*, referring to *bona fide* occupants who suppose they have a good title, not to *squatters*, provides, that if sued in ejectment, they may either pay for the land, or oblige the claimant to pay for the improvements, at his election.^{(4)(c)}

71. In Illinois, where one has actually resided upon land, and can

(1) 2 Scott, 182; *Stevens v. Bomar*, 9 Shemwell, 4, 578; *Ware v. Brush*, 1 McL. 533; *Bowman v. Wathen*, 2, 376; *Boyce v. Dudley*, 8 B. Mon. 511; *Rosson v. Anderson*, 9 B. Mon. 423; *Rogers v. Moore*, 9 B. Mon. 401.

(2) Ten. St. 1827, 78.

(3) (2) Ky. Rev. L. 1125, *et seq.*; Sts. 1852, 317; Rev. Sts. 316; *Masterson v. Marshall*, 5 Dana, 414; *Thruston v. Masterson*, 9, 235; *Gates v. Jacob*, 1 B. Monr. 310; *Taylor v.*

(4) Ang. 40; *Walk.* 303-20-1; *Lewis v. Baird*, 3 McL. 56.

(a) A mere naked possession for seven years, without color of right, is not sufficient to give a title. *Hannum v. Wallace*, 1 Humph. 443. Otherwise, if under a title bond. *Brown v. Johnson*, Ib. 261.

(b) It is held, that a judgment in ejectment does not stop the running of the statute of limitations. *Smith v. Trabue*, 1 M'L. 88. Possession by a private person for twenty years, of land laid out as a street or alley, vests the title in him. *Dudley v. Frankfort*, 12 B. Mon. 610.

(c) A deed made in 1835, by two surviving executors of a person who died seized in 1804, will not avail against an adverse possession of more than twenty-one years, since the death of the last devisee. *Ward's, &c. v. Racer*, 20 Ohio, 250.

If such deed, made in 1835, has relation back to the "inception of the power," as given in the will, so as to defeat the estate in the heirs of the last devisee, it gives a right of action to the plaintiff's lessor at the same period, and the statute of limitations will then begin to run. Ib.

show a connected record title in law or equity, under the State or the United States, or by sale for taxes or upon execution, or by judgment of a court of record, his title cannot be defeated, by entry or action, after seven years' uninterrupted possession. The time runs from his acquisition of title. Heirs, devisees and assigns are within the provision. Seven years are allowed from removal of disabilities, including absence from the United States, in the employ of the United States, or of the State.(1)(a)

72. In Missouri, entry and action are limited to twenty years. Ten years are also allowed after the removal of any disability;(b) or, to heirs, after the death of the party disabled. No entry is valid as a claim, unless a suit be brought upon it within one year, and in twenty years from the right accrued. A descent cast does not affect the right of entry.(2)

73. In Indiana, there is said to be no statute limiting the action of ejectment. Hence twenty years' possession is no bar to an entry on land.(c) In Michigan, twenty years is the period of limitation. In Arkansas and Iowa, the limitation is ten years. An entry is not effectual as a claim, unless a suit be brought within one year therefrom, and within ten years from title accrued. A descent cast does not affect the right of possession. Disabilities include absence from the State. Five years are allowed from their removal; also from the death of a party laboring under them. Absence (of the disseizor, it seems) either at the commencement or during the course of the ten years, is not included in the time of limitation. So the continuance of an injunction from Chancery. So, in case of absconding, concealment, or other wrongful act. If there are several disabilities, all must be removed before the limitation commences. In case of judicial sales or those made for taxes, an action against the purchaser is limited to five years, with a saving of three years for infancy, insanity and absence beyond sea.(3)

74. The expression used in American statutes of limitations, to denote the *absence* which constitutes a disability, is ordinarily, and except where it has been otherwise noticed, "beyond seas," or "out of the United States." These expressions are usually construed, undoubtedly, according to their literal meaning. But in the United States Court, in Maryland, Arkansas and Ohio, "beyond seas," means *out of the State*. So, in Kentucky, the same construction is given to the words, "out of the country." In Connecticut it has been held, that Halifax, in Nova Scotia, is not *over sea*.(4)

(1) Ill. St. 1835, 42. See *Irving v. Brownell*, 11 Illin. 402; *Lewis v. Broadwell*, 3 McL. 560.

(2) Misso. St. 392-3. See *Paddleford v. Dunn*, 14 Mis. 517; *Biddle v. Mellon*, 13, 335, *Smith v. Newby*, 13, 159.

(3) *Henthorn v. Doe*, 1 Blac. 168. See *Stephenson v. Doe*, 8 Blackf. 508; *Jones v. Hays*, 4 McL. 521. (But see Ang. App. 41;) Mich. L. 255-6; Ark. Rev. St. 529-32; Iowa

Code, 334.

(4) *Ward v. Hallam*, 2 Dall. 217; 6 Ohio, 125; *Brent v. Tasker*, 1 Har. & McHenry, 89; *Pancoast v. Addison*, 1 Har. & J. 350; *Murray v. Baker*, 3 Wheat. 541; *Field v. Dickinson*, 3 Pike. 409; *Wakefield v. Smart*, 3 Eng. 488; *Bank, &c. v. Dyer*, 14 Pet. 141; 3 Bibb, 510; *Gustin v. Brattle*, Kirby, 299. See 20 Pick. 304.

(a) The act of 1838-9, providing that every person in actual possession, under claim and color of title made in good faith, who shall continue in possession, and pay all legal taxes for seven successive years, shall be held and adjudged the legal owner, to the extent, and according to the purport of his paper title; is unconstitutional. *Arrowsmith v. Burlingim*, 4 McLean, 489.

(b) As in New York, sec. 57.

(c) Lut see 4 Kent, 187 n.

75. On the other hand, it is held in Georgia, that *out of the State* means *beyond sea*.(1)

76. In Tennessee it has been held, that *slavery* is an *imprisonment* within the meaning of the statute.(2)

77. In nearly all the States, substantially the same provision is adopted, (copied from the English Statute of James,) which has already been mentioned as prevailing in Massachusetts; with regard to the right of commencing a new action within one year from the termination of a former one, which has failed from some informality. The provision is found in Vermont, Maine, (where six months are allowed,) Connecticut, New Jersey, Pennsylvania, Virginia, North Carolina, South Carolina, (where a plaintiff failing for any cause may also have another action within two years,) Alabama, Tennessee, (where allowance is also made for the absence of a *defendant*, so that he cannot be served with process,) Kentucky, Ohio, Missouri, Mississippi, Michigan, and probably the other States. In Pennsylvania, three years are allowed in case of *abatement* of proceedings. In some instances the phraseology leaves it doubtful, whether the provision in question, as well as that relating to *the absence of a defendant*, applies to real actions, or exclusively to personal.(3)(a)

(1) Ang. App. 132.

(2) *Matilda v. Crenshaw*, 4 Yerg. 299.

(3) Con. St. 363; 1 N. J. L. 412; 1 Vir. Rev. C. 490; 2 Brev. Dig. 20-22-24; 2 Scott, 484; 2 Ky. Rev. L. 1137; Ang. App.

9, 12, 21, 28, 34, 40, 43; 1 N. C. Rev. St. 372; Aik. Dig. 271; Purd. 583-4; Missi. Rev. C. 186; Mich. L. 256; Ark. Rev. St. 530; Me. Ib. 622.

(a) As to the laws of Texas upon this subject, see *Coyce v. Lewis*, 2 Tex. 294; *Carson v. Rainey*, Ib. 296.

An adverse possession, continued for the period prescribed by the statute, is a bar. What facts will amount to proof of such possession, in each case, is a question of evidence, not of pleading. They must amount to a disseizin, and be such as will give a cause of action. *Portis v. Hill*, 3 Texas, 273.

To constitute a disseizin, as between the different classes of co-tenants, there must be an actual ouster, because the seizin and possession of one, is, in law, that of the others. Ib.

Where pleas were framed in reference to the 38th section of the Texas act of December 20th, 1836, or to the 16th section of the act of limitations of 1841; held, they were insufficient, in not alleging the facts which constituted the statutory bar, and that the possession was adverse. Ib.

In Arkansas, a deed, from a collector of taxes, duly acknowledged and recorded, purporting to be of land duly assessed for taxes, and sold for non-payment thereof, is evidence of the regularity and legality of the sale; or, if not of itself such evidence, yet when followed by continued possession of the grantee for five years, bars the right of the owner, under the statute, which provides that "all actions against the purchaser, his heirs or assigns, for the recovery of lands sold by any collector of the revenue for the non-payment of taxes, shall be brought within five years after the date of such sale." *Pillow v. Roberts*, 13 How. U. S. 472.

CHAPTER LXXVII.

DESCENT.

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| 1. Nature of the title; whether <i>natural</i> or <i>positive</i> .
3. What right or property descends; distinction of freehold and chattel interests; heir of person <i>last seized</i> .
19. <i>Consanguinity</i> or <i>kindred</i> , what.
20. Illegitimate children; whether they inherit; presumption as to legitimacy.
38. Aliens, rights of, as to inheritance. | 61. <i>Canons of descent</i> ; distinction between the English and American law.
62. Characteristics of the English rules of descent.
64. Computation by the civil law.
69. General principles of descent in the United States; and statutory provisions in the several States. |
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1. *Descent* is the title, whereby one man, upon the death of another, acquires the estate of the latter, as his heir at law.(a) An heir, is he upon whom the law casts the estate, immediately on the death of his ancestor; and such estate is called an inheritance.(1)

2. The title by descent, although universal among civilized nations, is not a *natural* right. Hence, the numerous and complicated modifications of the title are not to be judged of, or objected to, upon grounds of natural justice. All statutes, regulating descent, may be considered as positive, and, in some degree, arbitrary rules. And when a person, by inheritance or purchase, becomes lawfully seized of any estate, without fraud or fault on his part, it would be as inconsistent with sound ethics as with sound law, to divest him of it, because the rule of law by which he held it was deemed unreasonable.(2)

3. All *real estate*, or all *freehold interest in land*, descends to the heir. It has already been seen, that estates less than freehold pass to the executor; and also, under the heads of *fixtures* and *emblements*, what things, annexed to, or connected with the land, descend with it to the heir, and what shall be treated as personal property.(3)

4. The heirs of one who dies intestate, may enter upon the land of which he died seized, and take the produce.(4)(b)

5. At common law, no one could inherit real estate, unless he was heir to the person *last seized*. It was not enough to be heir to him who last had *the right* to the land, but no actual *seizin*. The common law maxim is, "*non jus sed seisinam facit stipitem*." It was *seizin* which made a person the *stirps* or stock, from which all future inheritance was de-

(1) 3 Cruise, 221.

(2) *Haven v. Foster*, 9 Pick. 127.

(3) Vol. I, chs. 1, 14.

(4) *Foster v. Gorton*, 5 Pick. 185.

(a) Or "the title to inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be a child or other issue."

(b) In Georgia, the heirs at law of a deceased intestate may maintain ejectment against a mere wrong-doer, for land of which their ancestor died seized and possessed. *Carruthers v. Bailey*, 3 Kelly, 105.

So the administrator may maintain ejectment for land, so as to enable him, as the agent of the law, to perform the duties enjoined upon him by the law, and for that purpose only. *Ib.*

But executors cannot sell the testator's real estate for any purpose, unless authorized by will. *Craig v. Craig*, 3 Barb. Ch. 76.

rived. This principle has been already referred to under the title of *Reversion*. (Ch. 52.) It was founded upon the feudal doctrine, which required that an heir should be of the blood of the first purchaser, and regarded the seizin of the last possessor as presumptive evidence of this fact. Upon this principle of the common law, where A died, leaving B his heir, and B died before entry, leaving C his heir, but, at the death of B, D was the heir of A; D would take the estate, and not C. So, if a man died leaving a widow, who was endowed of the land, and at the death of the husband A was his heir, but at the subsequent death of the widow B was his heir, but C the heir of A, who died before the widow; B would take the land, and not C; because the endowment of the widow, taking effect by relation from the husband's death, interrupted the seizin, and B was the first person after the husband, who was actually seized of the land.(1)

6. The English rule was subject to some exceptions. Thus, in some cases, where an ancestor acquired an estate by purchase, his heirs might inherit it, though he had never entered. So in case of an exchange of lands, if one party had entered, and the other died before entry, the heirs of the latter might inherit. So, (as has been seen, Vol. I, ch. 2,) the possession of a tenant for years, guardian or brother, is equivalent to that of the party himself, and termed in law *possessio fratris*. And the common law rule is inapplicable in equity, where a mere contract for a conveyance vests a descendible equitable title.

7. A *mesne* or intermediate reversioner or remainder-man may, by his own acts in relation to the estate, change its course of descent, and make himself the *stirps* or root of inheritance. Thus, if he make a conveyance of his interest for his own life, this will have the same effect with an entry upon a descent.(2)

8. It is said, that an alteration of the common law doctrine upon this subject has been recommended by the English real property commissioners. And it would seem that in this country, in most of the States, the English rule is either not adopted, or expressly, or by implication, abrogated. In New York, under the statute of descents of 1786, the rule was repeatedly held to be in force; but the language of the Revised Statutes, upon inheritances, is made sufficiently comprehensive, to render transmissible by inheritance every possible right or title to real estate, whether accompanied by actual seizin or not, with the exception of estates *pour autre vie*.(a) The Massachusetts Revised Statutes are equally comprehensive. And Chancellor Kent remarks, that the same alteration of the common law rule has taken place in Rhode Island, Connecticut, New Jersey, Pennsylvania, Delaware, Virginia, South Carolina, Georgia and Ohio, and probably in other States; while in Vermont, New Hampshire, Maryland and North Carolina, the doctrine of *possessio fratris* would seem still to exist.(3)

(1) Co. Lit. 14, 15, 241; Watk. on Desc. 65-6-7, 110-12; Sulli. on L. T. 153; Stearns, 29, 30-2-3-4.

(2) Co. Lit. 15 a, 191 b; Stringer v. New, 9 Mod. 363.

(3) Jackson v. Hendricks, 3 John. Cas. 214; Bates v. Shraeder, 13 John. 260; Jackson v. Hilton, 3 Kent, 388; Adams v. Chaplin, 1 Hill, 269; 4 Mas. 467; 2 Pet. 59; 2 Tuck. Black. App. n. b.

(a) One owning a reversion, subject to a life estate, though not seized so as to become a stock of descent, is capable of alienating his estate. Fowler v. Griffin, 3 Sandf. 385.

So one who has a vested remainder in fee-simple, expectant on the determination of a present freehold estate, has such a seizin in law, where the estate was acquired by purchase, as will constitute him a *stirps*, or stock of descent. Wendell v. Crandall, 1 Comst. 491.

9. In Ohio, any right or title descends; the rule of *last seized* is not in force. In Maine, an heir may bring an action before entry.(1)

10. In North Carolina, lands descend to the issue of a person, who died *last actually or legally seized*. In Tennessee, the right of one dis-seized descends to his heir.(2)

11. The following cases, bearing upon the point in question, have been decided in Massachusetts.

12. Devise by A to B, his wife, for her widowhood, remainder in fee to his daughter C, the wife of the demandant. After A's death, and during the life of B, C died, leaving an only child D, who afterwards died without issue, intestate. Afterwards B died, and the demandant brought a suit as heir of his son D. The defendant E claimed as husband of the niece of C, the wife of the demandant. The court, after argument, gave judgment for the demandant.(3)

13. The case of *Williams v. Amory*,(4) seems to have proceeded upon the ground, that a remainder-man, who died before the expiration of a tenancy for life, was a proper stock of descent. In that case, the intestate took by purchase, and therefore was at common law a proper stock of inheritance; and, as he left only one child, the descent was the same as at the common law. The court, however, took no notice of the case in this particular view; but decided that reversions, &c., were, under our laws, liable to be taken in execution for the debts of the reversioner, &c., as *real estate*.

14. In *Whitney v. Whitney*,(5) the court held that a reversion in the hands of a *mesne* reversioner was, on his death, to be considered as assets for payment of his debts, though the tenancy for life did not expire till after his death. The reasoning of the court proceeds upon the admission of the common law doctrine, and that it had been changed by our statutes.

15. Judge Story, who cites the above cases, remarks, however, that as this is a point of local law, he should have been glad to have found it adjudicated in the State tribunals; but, unfortunately, no such case is known to exist.(6)

16. The question first distinctly arose, in a case in the United States Circuit Court, where it was claimed that an intervening tenancy by the curtesy defeated the seizin of the heir. But it was held, that the reversion expectant thereupon descended like any other real estate.

17. Judge Story, in his opinion, traces the course of Massachusetts legislation upon the subject of the descent and distribution of estates; and comes to the conclusion, that the terms used in all the successive statutes are broad enough to embrace reversions and remainders, and to change the common law rule. The colonial acts of 1641 and 1649 speak of *estate* generally. The provincial act of 1692, (4 Wm. and Mary, ch. 8,) authorizes every person, lawfully seized in fee of *lands, tenements and hereditaments*, to devise them; and provides, that if not disposed of, they shall be *distributed* as intestate estate. The act of 1783, ch. 36, uses substantially the same language, omitting the word *lawfully*; and in another clause charges the *real estate* with debts. The

(1) Walk. 333; Me. Rev. St. 610.

(2) 1 N. C. Rev. St. 236; *Guion v. Burton*, Meigs, 565.

(3) *Ames v. Gay*, (1749,) cited 4 Mas. 491.

(4) 14 Mass. 20.

(5) Ib. 88.

(6) 4 Mas. 484.

act of 1805 provides, that when one shall die seized of any lands, &c., or of *any right thereto*, or *entitled to any interest therein*, not having devised the same, it shall descend, &c. A reversion is clearly a *right* or *interest* in lands. It is also included in *tenements and hereditaments*, and even *lands*. Moreover, a reversioner is *seized* of his reversion; by which is meant, that he has a fixed vested right of future enjoyment. Upon any other construction, the above statutes of 1692 and 1783 would have made no provision for the descent of reversions, &c., vested by *purchase* in the ancestor, or even those vested in the original donor of the particular estate. The word *seizin*, in all the acts, is equivalent to *ownership*; otherwise, the statutes of 1783 and 1805, which speak of any one who shall *die seized*, would make no provision for the descent of the right of one disseized, which would accordingly descend to the heir at *common law*. But, however this may be, the words *any right* or *interest*, in the act of 1805, leave no room for doubt upon the point. The same construction is confirmed by the words *real estate*, and the provision subjecting *real estate* to debts. The legislature has uniformly looked to the last intestate as the stock of descent, with one or two exceptions, such as that of a child's dying under age, &c.; which exceptions show that no others were intended. If the common law is to govern in case of reversions, &c., as to the stock of descent; there is no reason why it should not as to the *heirship* also; and the heir at common law must therefore inherit. The fact, also, that no claim has ever been made in the State upon the common law doctrine, strongly negatives its adoption as our rule of law.(1)

18. These views have been approved, and the same general doctrine established, by a recent decision of the Supreme Court of Massachusetts. The same point has been also decided in Connecticut. The court seem to ground their opinion chiefly upon the consideration, that the statute of distributions passes both real estate and personal to the same persons.(2)

19. *Consanguinity* or *kindred*, is the connection or relation of persons descended from the same stock; and is of two kinds, *lineal* and *collateral*. Lineal consanguinity is that between persons, one of whom is descended in a right line from the other; such as father and son. Collateral consanguinity is that between two persons who are lineally descended from the same common ancestor.

20. By the common law, an *illegitimate* child cannot inherit an estate.(a) The maxim of law is: "*hæres legitimus est, quem nuptiæ demonstrant.*" An heir must be born after actual marriage of his father and mother. A bastard is regarded as "*nullius filius*," and alike incapable of being

(1) *Cook v. Hammond*, 4 Mas. 467. (But see 13 Pick. 337—"a reversioner, &c., cannot be said to hold real estate.") (2) *Hillhouse v. Chester*, 3 Day, 166; (4 Day, 306;) *Russell v. Hoar*, 3 Met. 187; 4 Kent, 413, n.

(a) At common law, though one born in Scotland before marriage is legitimized by the subsequent marriage of his parents, he still cannot inherit real estate in England. *Doe v. Vardill*, 6 Bing. N. C. 385.

If issue, born before marriage, by the laws of the country where they are born, would be legitimated by the subsequent marriage of the parties, they will, by such subsequent marriage, (perhaps in any country,) at all events in the same country, become legitimate, so that this character of legitimacy will be recognized in every country; but if illegitimate where born, the same character will belong to them in every other country. *Smith v. Kelly*, 23 Miss. 167.

an heir himself, or transmitting an estate to any heirs except his own children; even to his mother.(1)

21. It was supposed to be the ancient rule, that where a married woman had issue, if the husband was capable of procreation, and within the four seas, these circumstances were conclusive proof of legitimacy. But it has been said that the rule was never universal; and now the question of legitimacy is one open to general inquiry, and upon which any pertinent evidence and presumptions are admissible, bearing upon the point of possibility or even probability. Probability of non-access beyond a reasonable doubt is sufficient to establish illegitimacy.(2)(a)

22. It was formerly held, also, that no posthumous child could be legitimate, unless he were born not more than nine months or forty weeks after the husband's death. But a similar change has taken place in the law upon this point; and any evidence bearing upon the particular case in issue, and tending to prove legitimacy, or the reverse, is now admissible, although a longer period have elapsed than the one mentioned. Thus, in one case, the child was adjudged legitimate, though forty-three weeks wanting one day had elapsed.(3)(b)

23. In most of the United States, the common law in relation to the rights of illegitimate children has been changed by statute, and in some instances modified by decisions.(c)

24. In Georgia, real estate may descend from a mother to her illegitimate children and their representatives. It also descends from such child, for want of children, to brothers and sisters born of the same mother, and their representatives, as in other cases.(4)(d)

(1) Co. Lit. 7 b; Cooley v. Dewey, 4 Pick. 93.

(2) Co. Lit. 126 a, n. 2; Goodright v. Saul, 4 T. R. 356; Stegall v. Stegall, 2 Brock. 256. See Regina v. Mansfield, 1 Ad. & El. (N. S.) 444.

(3) Co. Lit. 123 b, n. 1; 3 Harg. Jur. Exer. 409; Foster v. Cook, 3 Bro. 347; (Stegall v. Stegall, 2 Brock. 256.)

(4) Prince, 202.

(a) By the Spanish law, children begotten after both parties know with certainty of the existence of an impediment to their marriage, are illegitimate. *Aliter* as to children begotten while both or one of the parties were ignorant of such impediment, or while a doubt existed in the mind of either as to the fact of any impediment. *Patton v. Philadelphia, &c.*, 1 La. Ann. R. 98.

(b) In Virginia, land shall not descend, except to one capable of inheriting, and in existence at the death of the deceased, or *en ventre*, and born within ten months. St. 1840, 48; Code, 516.

(c) The legislature of Georgia possesses the power to make bastard children legitimate, and capable of inheriting. *Beall v. Beall*, 8 Geo. 210.

Where an act of the legislature is passed, legitimatizing bastard children to their reputed father, his assent thereto will be presumed. *Ib.*

An act of the legislature, changing the name of an illegitimate child, and declaring her legitimate and capable of inheriting, and of like privileges in law, as if she had been born in lawful wedlock; as it does not declare her the legitimate heir of anybody, has only the effect to change her name. *Edmonson v. Dyson*, 7 Geo. 512.

A died, leaving all his estate by will to an illegitimate and only child, who was legitimatized after A's death by an act of the legislature. There were numerous collateral heirs. Held, the State was entitled to a collateral inheritance tax out of the estate, as this right had vested on A's death, and before his child's rights were established. *Galbraith v. The Commonwealth*, 2 Harris, 258.

(d) Divorce does not bastardize children; nor a second illegal marriage, with some exceptions. *Prince*, 189, 645. A similar rule in Kentucky; (1 Ky. Rev. L. 562,) and Virginia, (1 Rev. C. 358.)

25. In Alabama, (a) Mississippi, Vermont, Massachusetts, Maine, Kentucky, Arkansas, Texas, California and Wisconsin, subsequent marriage of parents, and recognition by the father, legitimize an illegitimate child. (1) In Vermont, where the putative father, with consent of the child, makes a writing which is registered in the Probate Court, the child becomes capable of inheritance, and legitimate *as to the father*; unless, within one year from coming of age, he dissent. (2)

26. In Illinois, subsequent marriage of parents legitimizes a child. (But by a subsequent provision, acknowledgment also seems to be necessary.) So in Maryland, Virginia, Missouri and Indiana. (3)

27. In North Carolina, a bastard may be legitimized on application of the putative father to court; either where he has married the mother, or she is dead, or married to another, or lives out of the State. In such case, the child may both inherit from the father and transmit an estate to his own heirs. (4)

28. In the same State, an illegitimate child inherits to the mother in default of others, but does not transmit to her. (5) (b)

29. In Ohio, acknowledgment alone legitimizes; in Michigan and Mississippi, marriage alone, (with the reputed father in Mississippi.) (6)

30. In Maine, a bastard inherits to one who, by a writing duly attested, acknowledges himself to be his father. In Maine and Massachusetts, he also inherits to the mother, but not, as representing his parents, to their kindred; unless, in Maine, the parents married and had children, and the father acknowledged him, as above, or adopted him into his family, in which case he becomes like a legitimate child. If he die without lawful issue, in Maine, the mother, or, if dead, her heirs, inherit to him. (7)

31. In New Hampshire, the mother and her heirs are the heirs of a bastard. If she leave no lawful issue, a bastard child and his issue inherit from her. In New York, the mother or her *relations* inherit, unless there is a widow. (8)

32. In Vermont, Alabama, Rhode Island, Virginia, Kentucky, Texas, California, Ohio, Indiana and Missouri, bastards may both inherit from, and transmit to their mothers real estate. In Tennessee, (c) bastards take,

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| <p>(1) Aik. Dig. 129; Verm. Rev. St. 292; 1 Ky. Rev. L. 661; Missi. Rev. C. 42; Wisc. Rev. Sts. 338; California Comp. Sts. 186; Texas Sts. 1848; Mass. Sts. 1853, 458; Maine Rev. Sts. ch. 93, sec. 3; Sts. 1852, 259.</p> <p>(2) Verm. Rev. St. 292.</p> <p>(3) Illin. Rev. L. 336, 626; Misso. St. 223; Ind. Rev. St. 238; Md. L. 748.</p> | <p>(4) 1 N. C. Rev. St. 91; Virg. Code, 516.</p> <p>(5) Flintham v. Holder, 1 Bad. & Dev. Eq. 345; 4 Kent, 414.</p> <p>(6) Walk. 334, 234; Mich. L. 65; Missi. Rev. C. 228.</p> <p>(7) Mass. Rev. St. 414; Maine L. 1838, 496-7.</p> <p>(8) 1 N. Y. Rev. St. 753; N. H. Rev. St. 331; N. Y. St. 1845, 257-8.</p> |
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(a) So a written declaration by the father. Clay's Dig. 135. Where the father and mother intermarry after the birth of an illegitimate child, and the wife dies without lawful issue, the child becomes legitimate, and the husband will be tenant by the curtesy of the lands of the wife. *Hunter v. Whitworth*, 9 Ala. 965.

(b) A was the mother of a legitimate son B, and illegitimate daughter C. C intermarried with D. C and D died, leaving a daughter E, to whom A devised her lands. E died, and it was held, in North Carolina, that the lands so devised descended to the brothers and sisters of her deceased father, to the exclusion of her mother's legitimate brother B. *Sawyer v. Sawyer*, 6 Iredell, 407.

(c) Under the act of 1819. c. 13, illegitimate children cannot inherit from any relation of their mother. *Brown v. Kerby*, 9 Humph. 460.

for want of lawful children, from the mother; and transmit to their brothers and sisters, if they leave no child or mother. In Indiana, a bastard inherits *through* the mother. In Maryland, from the mother. In Illinois, a bastard or his descendants inherit to the mother.(a) In Michigan, he alone.(1)

33. In Virginia and Kentucky, bastards may inherit through the mother, and transmit to their line as descendants. But they are not empowered to inherit from or transmit to their collateral kindred. Thus, where a bastard dies without issue, leaving no mother, the legitimate children of his mother cannot inherit his estate. But where a bastard married and died, leaving a legitimate child; the parents afterwards married; the father, before the marriage, recognized her as his child, and also after his marriage, which was after her death; held, the child of the bastard might inherit, through his mother, from her father.(2)(b)

34. In Vermont, Connecticut and North Carolina, it has been held, that one illegitimate child may inherit to another of the same mother.(3)

35. In Connecticut, it has been held, that bastards inherit from the mother as falling under the term *children*, in the statute of distributions; and illegitimate children of one mother also inherit to each other.(4)

36. This decision, however, has been questioned, and it is undoubtedly contrary to the general rule of the English law, in an analogous case. According to this, an illegitimate child is *prima facie* not included in the term in question, when used in a *will*. There must be special words in the will, or peculiar extrinsic circumstances, to justify a different construction. And in a late case it is held, that an illegitimate child cannot take, where there are legitimate children to whom the word may be applied. In some of the States, the statutes of descent expressly except illegitimate children.(5)(c)

37. A statute, providing that where a man having by a woman one

(1) Tenn. Sts. 1851-2, 43; Walk. 333, 234; Ind. Rev. St. 238; Misso. St. 223; Illin. Rev. L. 626; 4 Kent, 413; Aik. Dig. 129; R. I. L. 223; 1 Verm. L. 349; Mich. L. 65; 2 Scott, 472; Verm. Rev. St. 292; Helms v. Franciscus, 2 Bland, 582; Little v. Lake, 8 Ohio, 289; Virg. Code, 516.

(2) 1 Ky. Rev. L. 561; 4 Kent, 413; Remington v. Lewis, 8 B. Mon. 606; Ash v. Way, 2 Gratt. 203.

(3) *Ib.*; Town, &c. v. Fosby, 6 Verm. 83; Brown v. Dye, 2 Root, 280; Flintham v. Holder, 1 Bad. & Dev. Eq. 345.

(4) Heath v. White, 5 Conn. 228; 1 Swift, 47; 2 Root, 280.

(5) Cooley v. Dewey, 4 Pick. 493; Wilkinson v. Adam, 1 Ves. & Beam. 422; Swaine v. Kennerley, *Ib.* 469; Beechcroft v. Beechcroft, 1 Madd. Rep. 234; Bagley v. Mollard, 1 Russ. & My. 581. (See Parke & J. 287; 1 N. Y. R. St. 754;) Dover v. Alexander, 2 Hare, 275; Thompson v. McDonald, 2 Dev. & B. 480; Meredith v. Farr, 2 Y. & Coll. Cha. 525.

(a) By St. of 1853, 255, the estate of a bastard descends to his or her wife, or husband and children. If no child or descendants, then to the wife or husband. If none, to the mother and her children, equally. Then to the next of kin of the mother.

(b) In Pennsylvania, a statute enables them to inherit and transmit the estate of a deceased mother. Held, this could not operate to divest property previously descended from a mother to her brothers, &c, and give it to the children of the bastard. Norman v. Heist, 5 Watts & S. 171.

(c) In Vermont, the term *issue*, as used in the Revised Statutes, means lawful, lineal descendants. Rev. St. 294.

or more children, shall afterwards marry her, the child, &c., if recognized by him, shall be legitimized; applies to children *in esse* at the time of its enactment. But it does not apply, where a child was born and the father had died before such passage, although he had devised his whole property to his children and his wife, describing the children as his and his wife's.(1)(a)

38. At common law, no person can be an heir, unless he is either a natural born citizen or has been duly naturalized.(b) On the other hand, an alien cannot transmit an estate by inheritance. He is said to have no inheritable blood. An alien may, indeed, himself take a freehold by purchase, though liable to forfeiture—otherwise the title of the grantor would not be divested. So, after taking, he may convey a defeasible title. But *the law* does nothing in vain. Therefore, when he dies, the land vests immediately in the Commonwealth, by escheat, without any inquest of office. But while the alien lives, the lands cannot vest in the State without office found.(2)(c)

39. A native citizen is one born in the United States since the Declaration of Independence,(d) or before, if he has removed here since that event; or the child of a citizen, born abroad, if his parents have ever resided here.(e) And this includes the child of one who was a citizen after the treaty of peace and the adoption of the constitution.(3)

(1) *Stevenson v. Sullivan*, 5 Wheat. 207.
 (2) *Slater v. Nason*, 15 Pick. 349; *Montgomery v. Dorion*, 7 N. H. 481; 6 John. Ch. 366; *Jackson v. Beach*, 1 John. Cas. 399.

See *Peck v. Young*, 26 Wend. 613; *Trimbles v. Harrison*, 1 B. Mon. 141.

(3) *Walk*, 137, 138; *Charles v. The Monson, &c.*, 17 Pick. 70. See 4 Rand. 631; 1 Bai. 275; 2, 558.

(a) Under the term "lawful issue," bastards cannot take a remainder in an estate given to the mother for life, then to her "lawful issue." *Black v. Cartwell*, 10 B. Mon. 188.

Devise in trust for A for life; at his death, "the interest for the maintenance of A's wife, and education of his children; at his wife's death, the principal to be equally divided among his children then living." At the date of the will, A was unmarried, but had illegitimate children, of which it was assumed the testator had knowledge. Held, such children did not take by the devise. *Warner v. Warner*, 2 Eng. L. & Equ. 68.

A testatrix directed, that certain property should be equally divided between her brothers' and sisters' children. Held, the legitimate children of her brothers and sisters took under this clause, *per capita*, but an illegitimate child would take nothing. *Kirkpatrick v. Rogers*, 6 Ired. Eq. 130.

Devise to an illegitimate son, and a daughter, called in the will illegitimate, of certain property, to be divided between them. The son, and the daughter with her husband, divided the estate. After the death of the husband and wife, leaving a child, who died without issue, the brother of the testator entered upon and claimed the daughter's portion. The son brings ejectment, and proves that the daughter was born after the marriage of her mother and the testator. Held, the daughter took under the will, though wrongly described as illegitimate, but that the plaintiff could not claim her estate as heir to her issue. *Ehringhaus v. Cartwright*, 8 Ired. 39.

(b) Where an alien *purchases* land and is afterwards naturalized, it seems, his title is thereby perfected. Otherwise, in case of heirship. *The People v. Conklin*, 2 Hill, 67. An alien could not, under the laws of Mexico, maintain an action for land in Texas. *Holliman v. Peebles*, 1 Texas, 673.

(c) Where the State itself has granted lands to an alien with warranty, such lands descend to his alien heirs, and the State is estopped to claim them by escheat. *Com. v. Heirs, &c.*, 3 Pick. 224. Whether an alien can take land by virtue of an execution levy; *qu?* *Gilman v. Thompson*, 11 Verm. 643.

(d) A statute of Maryland provides, that those who came into the State, before adoption of the constitution of the United States, may hold lands. Md. L. 1813, ch. 105. Where a person was born in this country, but left it in July, 1783, and never returned; held, he was an alien. *Orser v. Hoag*, 3 Hill, 79. See *Trimbles v. Harrison*, 1 B. Mon. 141.

(e) So the child of an alien, born abroad, if he is in the United States when his parent is naturalized. *West v. West*, 8 Paige, 433.

40. Naturalized citizens, are those who go through the prescribed process for naturalization; their minor children at that time in the country; or the widows and children of those who have taken the initiatory steps for naturalization, but have died before they were actually naturalized.(1)

41. All free white adult persons may be naturalized, if belonging to a nation at peace with us. They must declare their intention under oath, before some federal or State court, or its clerk, two years previously, unless where they have resided here since 1812, or unless they are minors, and have resided here three years before majority with the intent to become citizens. They must have resided one year in the State, and conducted as good citizens; facts to be proved otherwise than by their own oath. And finally, they take an oath to support the constitution, abjure all foreign allegiance, and renounce all titles of nobility.(a)

42. All persons not citizens are aliens, except Indians and colored persons. The Indians may and do hold lands, but by a peculiar tenure, the mere right of occupancy, and subject to the absolute ownership, in fee, of the United States. (See ch. 2.) Free colored persons undoubtedly have the capacity of inheriting and holding real estate.(b)

43. In Tennessee, it is provided, that no child of color shall inherit from the husband of the mother. This does not apply, however, where either husband or wife is colored.(2)

44. Where an alien has two sons born in the country, one may in-

(1) Ib.

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(2) Ten. St. 1825, 13.

(a) See *State v. Penney*, 5 Eng. 621. The residence of a minor child with his father within the United States during the whole revolutionary war, and till after the treaty of peace; gives the child all the rights of citizenship. *Calais v. Marshfield*, 30 Maine, 511.

And, if he remove to a British province, on coming of age, and for some years adhere to the British government, but afterwards resume his residence in the United States; his right of citizenship revives. Ib.

The naturalization of a father *ipso facto* makes his son, then residing in the United States, and under twenty-one years of age, a citizen. *State v. Penney*, 5 Eng. 621.

The act of Congress of 1802, providing that children of persons duly naturalized, being under twenty-one, and dwelling in the United States at the time of such naturalization, shall, if dwelling in the United States, be considered as citizens, applies to children of parents naturalized after, as well as before, the passage of the act. Ib.

An alien who has emigrated to the United States since June 18, 1812, and who was not a minor on his arrival, is not entitled to take the oath of naturalization on five years' residence, without having made the declaration of his intention to become a citizen, required by the act of May, 26, 1824, two years before his application to take the oath of naturalization. *Matter of Browlee*, 4 Eng. 191.

Although, under the sixth article of the treaty of 1783, lands held by British subjects in New York might be transmitted by descent to a citizen, they could not, upon the death of such British subjects, previous to the treaty of 1794, pass by descent to an alien, born after July 4, 1776. *Brown v. Sprague*, 5 Denio, 545.

An alien declared, that it was *bona fide* his intention to become a citizen, and to renounce and abjure all allegiance and fidelity to every foreign prince, state, potentate, and sovereignty whatever, and particularly to the Queen of Great Britain and Ireland, according to the several acts of Congress in such cases made and provided. Held, the declaration was good, though the name of the queen was not stated. *Ex parte Smith*, 8 Blackf. 395.

Where it is clearly inferable from a record of naturalization, that the alien had not, at least three years previous to the date thereof, declared on oath his intention to become a citizen, and to renounce all allegiance, &c.; but that the court has mistaken the registry of his arrival for such a declaration; it seems, the naturalization is invalid. *Banks v. Walker*, 3 Barb. Ch. 438.

(b) It is said, in Tennessee, the right of a free negro to hold lands can be questioned only by the government. *Winnard v. Robbins*, 3 Humph. 614.

herit to the other, although he cannot claim through the father. Contrary to the general rule, the descent shall be immediate, and not through the common ancestor.(1)

45. The common law rule, which precludes aliens from holding lands, has been very extensively changed in the United States. Those alterations which relate to *descent*, will be here noticed.

46. In North Carolina(a) and Vermont,(b) the constitution provides, that persons of good character, coming into the States and settling, and taking an oath of allegiance, may hold lands.(2)

47. It is said that in Ohio, and the new States generally, for the encouragement of new settlers, aliens are made capable of holding real estate.(3)(c)

48. In Missouri, Indiana, Georgia and Tennessee(d) they may do it, after expressing, in legal mode, their intention to become citizens; and in Missouri, those in the State without such condition. So, a descent may be derived through an alien, in Missouri and Arkansas. In Tennessee, if an alien sell land, taking back a mortgage, upon which the land is sold, he may legally purchase it. In Illinois, both aliens and *denizens* may inherit and transmit an inheritance. In Michigan, aliens inherit, and a statute confirms all past titles affected by alienage. In New Hampshire, resident aliens may hold lands.(4)

49. In Kentucky and Ohio, descent may be claimed through an alien. Aliens may receive, hold and transmit lands, if they are and have been, for two years, residents in the State.(5)

50. In Massachusetts it has been held, that the statute of 11 & 12 Wm. III, c. 6, providing that natural born subjects may inherit through alien ancestors, was adopted in this State before the adoption of the constitution.(6)

51. In Maine, if an alien purchase lands, and afterwards become naturalized, he may hold or transfer such lands; and they will descend from him, unless claimed by the State before such naturalization. If

(1) Collingwood v. Pace, 1 Ventr. 413; 2 Bl. Com. 250; Slater v. Nason, 15 Pick. 349.

(2) 2 Kent, 69, 70.

(3) Walk. 139.

(4) Misso. St. 66, 223; Illin. Rev. L. 626; St. 1851, 149; Mich. L. 272; Tenn. St. 1839-40, 63; Ark. Rev. St. 329; N. H. Rev. St. 242; Ga. Sts. 1849-50, 46; State v. Beakmo, 8 Blackf. 246.

(5) 1 Ky. Rev. L. 111, 112, 561; Ohio St. 254; Beard v. Rowan, 1 McL. 141.

(6) Palmer v. Downer, 2 Mass. 179, n. (See Keith v. Wombell, 8 Pick. 211.) By St. 1852, 804, aliens may take, hold, convey and transmit real estate. So in Texas. Tex. Sts. And Wisconsin. Rev. Sts. ch. 62, sec. 35. By Mass. St. 1852, 810, no title shall be affected by the alienage of a former owner. The act does not affect any land conveyed or released by the Commonwealth.

(a) Where land is given in trust for an alien, the trust cannot be enforced in his favor. Atkins v. Kron, 5 Ired. Eq. 207.

(b) In this State, it is held, that the fact of a person's residing, and having for many years resided, in Canada, is not sufficient proof of alienage. Gilman v. Thompson, 11 Verm. 643.

(c) In Indiana, an alien, who has taken no steps towards naturalization here, cannot transmit a title to lands by descent. Huddleston v. Lazenby, 1 Smith, 203. To entitle the heirs of an alien to land of his ancestor, and which has escheated to the State, under the act of 1839, it must appear that the ancestor died in possession of the land. Ib.

(d) The Tennessee act of 1809, c. 53, provides, that where any person shall die intestate and without issue, his estate shall descend to the next of kin to the decedent, resident in the United States, to the exclusion of aliens related to the decedent in a nearer degree. It results from this statute, that, contrary to the course of the common law, the course of descent is not broken or changed by the alienage of the ancestor of the next resident of kin, but that such next of kin shall inherit, as if such alien ancestor had been a resident or naturalized citizen, and had died. Starks v. Traynor, 11 Humph. 292.

an alien make declaration in court of his intention to become naturalized, and die without doing it, his lands pass by descent or devise. Where one was in possession of lands on or before Jan. 1, 1834, they shall not escheat for the alienage of the party through or from whom he derived them. A citizen may inherit through an alien. Land purchased by an alien descends to native children.(1)

52. In Connecticut, it was formerly provided, that an alien should not purchase or hold lands without special license from the General Assembly. By another act, (of 1824,) apparently prior to the one referred to, but subsequently published as still in force, a foreigner of fair character, after six months' residence, might be authorized by Chancery to receive, hold and transmit real estate. By a late statute, aliens, having declared their intention to become citizens, and lived in the State one year, may hold and transmit lands.(2)

53. In New York, the alienage of an ancestor is no bar to an inheritance. An alien may inherit, after making oath of his intention to become a citizen, and that he has taken the incipient measures therefor. And if he die within six years, his heirs, being inhabitants, take by descent. A resident alien may make a deposition or affirmation, before any officer authorized to authenticate deeds, of his intention to become a permanent inhabitant, and that he has commenced the process of naturalization; which deposition, &c., shall be admissible evidence.(3)(a)

(1) Maine L. 1834, 110, 111; Rev. St. 372, 380, 381; Sts. 1850, 197.

(2) Con. St. 349, 251; Ib. 1845, 4.

(3) 1 N. Y. Rev. St. 754, 720; N. Y. L. 1834, 488. See *McGregor v. Comstock*, 3 Comst. 408; *Banks v. Walker*, 3 Barb. Ch. 438.

(a) Other acts have been passed on this subject, enlarging the times provided by former statutes. N. Y. L. 1831, 204; 1832, 280; 1833, 194; 1838, 17. A nephew, though naturalized, and though the son of an alien, who is living, cannot inherit to his uncle, the statutes not applying to such a case. *People v. Irwin*, 21 Wend. 128. And where, of the next of kin to the deceased, some are aliens and others not, the latter take as if the former did not exist. *Orser v. Hoag*, 3 Hill. 79. By late statutes, (April 10, 1823,) aliens previously naturalized hold property which came to them in any way previous to naturalization; and their transfers are confirmed. (St. 1843, 62.) A resident alien, to whom land has or may come, and who, within one year from the time of acquiring it, or from the date of the act, files a deposition, &c., under part 2, ch. 1, art. 2, sec. 15, of the Revised Statutes, may hold or convey for five years from the date of the act. And a past transfer is confirmed. The act is not to affect any pending suit by the State, or any vested title. Ib. 62-3. Heirs, past and future, inherit; but if males, and of age, not unless they are citizens or make affirmation, &c. In case of a grant or devise from an alien, the grantee, &c., though an alien, holds, if he make affirmation, &c. St. 1845, 94-5.

The New York statute of 1845 (Laws, 1845, p. 94) does not operate to confirm a title previously conveyed by an alien heir of one holding real estate. *Brown v. Sprague*, 5 Denio, 545. Under the Revised Statutes, an alien can take land by purchase, and, in case of lands which, under those statutes, would escheat, the attorney-general alone can take advantage of it. *Leefe*, 4 Edw. Ch. 395.

Claim of an estate belonging to the uncle of the claimant, through the mother of the latter, who was an alien, the claimant himself never having been in possession. Held, the statute of 1843 cured only the disability of a party's own alienage and not that arising from the alienage of an ancestor; and therefore the claim could not be sustained. *Redpath v. Rich*, 3 Sandf. 79.

In New York, aliens, and the children of aliens, are incapable of taking and holding real estate by devise. Otherwise with a female, married to an alien, and residing in a foreign country; who may take an interest in real estate under a will. *Beck v. McGillis*, 9 Barb. 35.

An act of the legislature of New York, authorizing aliens to purchase and hold real estate in that State, declared, that all and every conveyance and conveyances, thereafter to be made or executed to any alien or aliens, &c.; should be deemed valid to vest the estate thereby granted, in such alien or aliens. Held, the language embraced sales, purchases and conveyances in trust. *Duke, &c. v. Graves*, 9 Barb. 595.

54. In New Jersey, an act once existed, and is probably now in force, enabling aliens to hold lands, if naturalized after acquiring them. Title by descent may also be made *through* an alien. By a late act, aliens may inherit.(1)

55. In Pennsylvania, an act of 1778 confirms the title to lands of those claiming under aliens, who had removed to that or any of the adjoining States for the purpose of settling. A subsequent statute provides, that any citizen or subject of a foreign friendly State may take and hold land by devise or descent. A late statute confirms the title of the heirs of aliens. By an act of 1814, an alien enemy, who resided in the State June 18, 1812, and has since resided there, may receive, hold and convey lands, not exceeding 200 acres, or \$20,000 in value, after having declared his intention to become a citizen. A late act provides, that past purchases, not exceeding 2,000 acres, or inheritances, by aliens, shall be confirmed, not, however, to affect any vested rights. Past sales by aliens to citizens are also made valid.(2)

56. In Maryland, an alien may take and hold lands, provided, (if a male,) within one year after the acquisition, he declare his intention to become a citizen, and within twelve months after being capable of naturalization become naturalized. If he die within a year from acquiring the land, without making such declaration, or, having made it, within the time allowed for naturalization, without being naturalized; and make no deed or devise; his heir inherits the land, provided *he* proceeds as above. Where the party is an infant, or *non compos*, the times above referred to are reckoned from removal of such disability. But no alien shall hold in trust for another alien, or for a foreign corporation. Alien white females, marrying white citizens, may inherit. Naturalization gives validity to prior acquisitions of lands.(3)

57. In Delaware, an alien, after declaring his intention to become naturalized, may take lands by deed or will, and transmit them by descent; and resident aliens may take by descent. Descent may also be claimed *through* an alien.(4)

58. In South Carolina, the provisions are similar to those in New York.(5)

(1) 1 N. J. L. 35; N. J. St. 1834, 1835, 67; *Bonaparte v. The Camden, &c.*, 1 Baldw. 216; N. J. St. 1845, 92.

(2) Pur. Dig. 38, 39, 40, 41; Penn. Stat. 1836, 1837, 121; St. 1844. 274. See *Rubeck v. Gardner*, 7 Watts, 455.

(3) Md. L. 1825, ch. 66; Ib. 1813, ch. 100; Ib. 1814, 79.

(4) Dela. St. 33.

(5) 2 Kent, 69.

Under the act of April 2. 1798, allowing aliens to take conveyances of real estate, situated in New York, a release may be executed by one of several trustees, in a deed of trust, to his co-trustees, of his estate and interest in the trust property, although the parties to such release are all aliens. Ib.

A statute provided and declared, that deeds and conveyances made in pursuance of a former act, which authorized and enabled aliens to purchase and hold real estate within the State of New York, should vest the lands conveyed, so far as related to the question of alienism in the grantees, their heirs and assigns, in such manner as to authorize them, being aliens, to give, devise, grant, sell, and convey the same to any other alien or aliens. Held, it was the intention of the legislature to remove the objection of alienism, in case of any number or succession of descents from one alien to another, and also in case of any number of grants or devises between aliens. Ib.

Held, also, the terms "heirs and assigns" were not to be restricted to the immediate heirs or assigns, but extended to all persons who might inherit the lands, or to whom they might be assigned. Ib.

59. In Georgia, where one dies and leaves no heir who can inherit his lands, because of his or her being an alien, the executor, &c., may sell, and pay the proceeds to the devisees or representatives of the deceased.(1)

60. In relation to the foregoing subject it is said, that no State can prescribe terms of *naturalization* different from those provided by Congress; because one State might thus give to aliens all the privileges of citizenship in every other; the constitution provides, that the citizen of one State shall have the rights of a citizen in the others. But each State has the undoubted right to regulate the law of descent within its own limits; and, by making aliens capable of inheriting, it does not give them such capacity in other States.(2)

61. With regard to the particular rules or *canons* of descent, it may be remarked in general, that in nothing, except the feudal tenures, has American law departed so widely from the common law of England. Indeed, substantially the same reason explains both the abrogation of the feudal system, and the introduction of new rules of descent, in the United States. That reason is of a political character; and equally so, as applied to each of the subjects in question. The feudal system of tenures, and the common law rules of descent, originating in the feudal system, and by which alone it could be perpetuated, are, in the very nature of things, equally inconsistent with a republican government; for both pre-suppose and maintain the accumulation of property in a few hands, while the very corner-stone of a republic is the equal distribution of property among the mass of the people.

62. Chancellor Kent lays down the characteristics of the common law rules of descent, as follows: preference of males and their descendants, unless the estate came from a female ancestor; primogeniture,(a) among males; that the estate shall never lineally *ascend*; exclusion of the half-blood; and succession *per stirpes*. A recent English statute, however, (3 & 4 Wm. IV, c. 106,) has greatly modified these ancient principles. By virtue of this act, descent shall always be traced from the purchaser of the land; and the person last entitled shall be deemed such purchaser, unless he inherited the land, in which case the person from whom he inherited shall be held the purchaser. Where a devise is made to *the heir*, he shall take as devisee, not by inheritance; and in computing heirship, the devisor shall be deemed the purchaser of the estate. A brother or sister shall inherit through a parent. A lineal ancestor shall inherit before a collateral relation, claiming through him; thus, a father, before a brother. Paternal ancestors and their descendants are preferred to maternal ancestors and their descendants; and male to female ancestors. Half-blood relations may inherit, next after relations of the whole blood in the same degree, and their issue, where the common ancestor is a male; and next after such ancestor, if a female.(3)

(1) Prince, 201. See Sts. 1849, 50, 46.

(2) *Montgomery v. Dorion*, 7 N. H. 482.

(3) 4 Kent, 411-12 and n.

(a) Before the Revolution, primogeniture prevailed in many of the States. In Rhode Island, till 1770; in Maryland, till 1715; in New York, New Jersey, Virginia, the Carolinas and Georgia, till the Revolution. In Massachusetts, Connecticut and Delaware, the eldest son had a double portion. So, in Pennsylvania, by an act of 1683, abolishing primogeniture, which continued in force till 1774.

63. The method of computing degrees of kindred adopted in this country, is that of *the civil law*,⁽¹⁾ except that in North Carolina the common law rule prevails, generally, and in New York with respect to the more remote relations.

64. The civil law method of computing degrees of kindred, in case of lineal relationship, ascends or descends from the intestate to the supposed heirs, each step making one degree; and the party removed by the fewest degrees from the intestate is the true heir. This rule is of course qualified by the principles already stated as to the right of representation, and the preference given to the descending line. Thus, in case of father and grandfather, the former is related in the first degree, and the latter in the second. The father, therefore, inherits before the grandfather. In case of collateral relationship, the degrees are reckoned by ascending from the intestate to the common ancestor of himself and of the supposed heirs, and then descending to the latter, calling each step one degree. Thus, supposing the claimants to be a brother and an uncle; in regard to the former, the steps are, from the intestate to his father, who is the common ancestor of brothers, and then from the father to the brother, which makes two degrees; while, with regard to the uncle, we ascend from the intestate to his father, thence to his grandfather, who is the common ancestor of uncle and nephew, thence to the uncle; which makes three degrees. The brother, therefore, inherits before the uncle. By the common and canon law, the rule as to lineal relations is the same with that of the civil law; but in regard to collaterals it is different. In the latter case, the degree of relationship is reckoned by descending from the common ancestor to the intestate, and the supposed heir; or, if they are unequally removed from the common ancestor, by descending to the more remote of the two parties, reckoning each step in the descent as one degree of relationship. Thus, a brother is related in the first degree, being one step removed from the father, the common ancestor; while a nephew is related in the second degree, because a descent from the grandfather, the common ancestor to a brother, is one degree, and from the latter to the nephew, is two degrees.

65. The general rule of descent in the United States is, that property descends to *the next of kin* to the deceased owner. From this rule the statutes of the several States have occasioned some deviations. But these apply chiefly to the more remote relations. In all the States, children, or, if dead, their representatives, take in the first instance, and representation continues in the descending line *ad infinitum*. In general, the father claims next, and then the mother and brothers and sisters in equal shares. This, however, is by no means a universal rule. The right of representation, that is, the right of lineal descendants to take what their ancestor would have taken, does not usually extend, with reference to collateral relatives, beyond the second degree of relationship, or beyond the children of brothers and sisters; and where there is any deviation from this rule, it will be particularly pointed out hereafter. Thus, if there are children of a brother of the ancestor, and one is dead and has left children, these last cannot take, either as next

(1) 1 N. C. Rev. St.; 1 N. Y. Rev. St. } Mich. L. 64; Maine Rev. St. 379; Hays v.
753; Mass. Rev. St. 414; Del. St. 316; Ib. } Thomas Bre. 136; Verm. Rev. St. 292.
1843, 489; Hillhouse v. Chester, 3 Day, 211; }

of kin, or by representation. The surviving children of the brother take the whole, as next of kin. It has already been suggested, that a different rule in regard to representation applies to lineal relations. For example, suppose A to die, and leave a son B, and two grandsons, D and E, by C, another son deceased, and two great grandsons, F and G, by H, a deceased daughter of C. In this case, the descendants of A are in three different degrees of consanguinity; viz., a son, two grandsons, and two great grandsons. The consequence of which is, that B, the son, takes one-half the estate; D and E, the grandsons, two-thirds of the other half; and F and G, the great grandsons, the remaining third of one-half. In England, the rule of representation is adopted, even where the parties are related in the same degree of kindred. Thus, if there be two granddaughters by one daughter of the deceased, and three granddaughters by another; the two former take an equal share of the estate with the three latter. It is to be observed, that where heirs take by representation what a deceased ancestor would have taken, they inherit *per stirpes*; but where all the claimants are related in the same degree to the intestate, they take *per capita*.(1)(a)

66. By the English common law, one related to an intestate by the half-blood only can never inherit; upon the presumption that he is not of the blood of the original purchaser. But the late statute of descents (3 & 4 William IV, c. 106,) as has been stated, greatly modifies this rule. And in this country the common law principle may be regarded as not in force, though in many of the States some distinction is preserved between the whole and half-blood. The ordinance for government of the North West Territory prohibited any distinction; but some of the States formed from this Territory have subsequently established one.(2)

67. With regard to collateral relations, it is to be observed that they may stand in the same degree of relationship to the intestate as lineal relations. Thus, a brother and a grandfather are related in the same degree. It is the general rule of American law, that brothers and sisters shall be preferred to grandparents. It has already been seen, that grandchildren inherit, not according to their degree of relationship, but as representing their parents, the children of the intestate. The general language of the American statutes of descent is, that brothers, &c., and *their descendants*, shall inherit before the stock of grandparents.

68. While the English law, upon the principle already referred to of connecting an heir with the original purchaser, always prefers the paternal line among collateral relations, the American law gives no such preference except to ancestral estates, and as to these it stops at the last purchaser in the ancestral line. Its general object is, to continue

(1) 4 Kent, 391, 392, n.; Mattison v. Tenfield, 3 Beav. 131. (2) 4 Kent, 403, n.; Seville v. Whedbee, 1 Badg. & Dev. (N. C.) 160; Butler v. King, 2 Yerg. 115; Lawson v. Perdriault, 1 McC. 456; Maine Rev. St. 379; Verm. Ib. 292.

(a) Where the surplus of an estate is equally divided between "the heirs of A and the heirs of B;" they take *per capita*. Hobbs v. Craige, 1 Ired. 332. Devise "equally between A, B and C, and the children of D, who reach the age of twenty-one." Four children arrive at that age. Held, they did not take *per capita*. Brett v. Horton, 4 Beav. 239. Devise to the legal heirs of the testator's brother A. At the testator's decease, these heirs were six of his children living, eleven children of his deceased daughter B, and three of his deceased son C. Held, the heirs of A took *per stirpes*. Daggett v. Slack, 8 Met. 450.

the estate in the family of the intestate, and, in effecting this, to pay due regard to the claims of the successive branches, and principally to the loud and paramount claim of proximity of blood to the intestate.(1)

69. Having thus stated the general principles of the American law of descent, I proceed to take a concise view of the statutory provisions in the several States. The principles above mentioned are, in most instances, positively enacted; but I deem it unnecessary to repeat them in connection with the several statutes, preferring to have it understood that they are in force, unless some repugnant provisions are expressly given.

70. In Massachusetts and Maine, real estate descends as follows: 1. In equal shares to children,(a) and to the issue of a deceased child; 2. If no child, to all other lineal descendants; 3. If no issue, to the father; 4. In equal shares to brothers and sisters, and the children of those deceased,(b) and the mother; 5. To the mother, excluding the issue of deceased brothers or sisters; 6. To the next of kin, preferring, however, those who claim through an ancestor nearest to the intestate. Where one dies, leaving several children, or one child, and the issue of another, if such surviving child die a minor and unmarried, the estate which he inherited from his parent descends equally to the other children of the same parent, and to the issue of other children deceased, by representation.(c) In Massachusetts, if all the other children of the same parent are dead, the estate descends to the issue of such children; equally, if related in the same degree to the intestate; if not, by representation. In Massachusetts and Maine, where real estate would otherwise escheat for want of kindred, the widow shall take as heir.(2)

71. In Massachusetts, brothers and sisters of the whole and half-blood inherit equally; upon the ground, that our statute of distributions copied the English act of Charles II, the final construction of which, after much doubt upon the point, admitted the half-blood.(3)

72. A statute declared, by way of proviso to a previous clause, passing the real estate to the mother and brothers, &c., that when a child should die a minor and unmarried, *his share of the inheritance* that came

(1) 4 Kent, 405; *McGundry v. Pinniger*, 7 Eng. Law and Equ. 148.

(2) Mass. Rev. St. 413-15; 1 Smith, 157-8; Me. Rev. St. 379; Mass. Sts. 1849, 514; Maine Ib. 1852, 283.

(3) *Sheffield v. Lovering*, 12 Mass. 490; (*Smith v. Tracy*, 1 Mod. 209; *Earl &c. v. Norcliff*, 1 Vern. 403; *Crooke v. Watt*, 2, 124; *Show. P. C.* 108.)

(a) A married woman, seized of an estate in fee, died intestate in 1789, in Massachusetts, while Stat. 1783, c. 36, sec. 1, was in force, which entitled her oldest surviving son to two shares of her estate. Her husband rightfully held her estate, after her death, as tenant by the curtesy, until his death, which was after January 1, 1790, when by Stat. 1789, c. 2, the said provision of Stat. 1783 was repealed, and the real estate of persons dying intestate was made to descend in equal shares to their children. Held, that the fee of the intestate's real estate vested in her children, at her decease, in the proportions prescribed by Stat. 1783, c. 36, and that her oldest son, upon the death of the tenant by the curtesy, was entitled to two shares, and her other children to one share each. *Miller v. Miller*, 10 Met. 393.

(b) In Maine, where one died leaving neither issue nor parents, but a child of one deceased brother and grandchildren of another; held, the child should inherit alone, it being the effect of the statute to preclude all representation among collaterals beyond brothers' and sisters' children. *Quincy v. Higgins*, 14 Maine, 309.

But by Stat. 1852, (p. 283,) the grandchildren of a brother or sister inherit in the same manner as the children of such brother or sister, the parent and grandparent, through whom such property would descend, being dead.

(c) See *Mayo v. Boyd*, 3 Mass. 13; *Runey v. Edmonds*, 15, 291.

from his father or mother, should pass to the children, &c., of such father or mother, &c. Held, this proviso was not designed to make a rule for a separate and distinct case, but only to modify the rule mentioned under certain circumstances; so that, upon the death of a child under age, &c., before he had legal power to dispose of the land, or had contracted new obligations, changing his relation to others, it should pass as if he had died before the intestate, or had never existed. The object is rather to give a new destination to this portion of the parent's estate, which has failed to accomplish the design of the legislature by the premature death of such child, than to provide a new and distinct rule of distribution for such child's own estate. Upon these grounds, and as the fair construction of the words, *share of the inheritance*; held, the proviso does not apply to real estate which came *by devise* to such child of the intestate.(1)

73. In New Hampshire, when a child of one intestate or testate dies, under twenty-one, and unmarried, the child's share of the estate, though its other parent be living, descends to its surviving brothers and sisters, and the lineal heirs in the descending line of such of them as are dead; but, if such child die over twenty-one, and unmarried, such share descends to the mother, and any brother or sister, or their heirs, the mother taking an equal share.(a) Where one dies after marriage, or, coming of age, without descendants, the father inherits; then the mother and brothers and sisters equally.(2)

74. In New Hampshire, under the statute of descents of 1789, copied from the English statute of distributions, it was held, that the law never looks to the source whence the estate was derived, to determine who shall inherit, except where the statute makes it material.(3)

75. In Connecticut, lands descend: 1. To children, and such as legally represent them, if any are dead; and if a child die under twenty-one, and unmarried, or before any legal disposition of his share, and unmarried, such share goes to the surviving children and their representatives. 2. Brothers and sisters of the whole blood, and their representatives. 3. The parent or parents. 4. Brothers and sisters of the half-blood, and their representatives. Then to the next of kin, preferring the whole blood of equal degree. Estate derived by descent, gift or devise from a relation, descends to brothers and sisters, and their representatives, of the blood of such relation; then to the children of such relation, and their representatives; then to his brothers and sisters, and their representatives.(4)

76. In Rhode Island, lands descend in equal portions: 1 To children, or their descendants; 2. To the father; 3. To the mother, brothers and sisters, and their descendants; 4. In equal moieties to paternal and maternal kindred, as follows; the grandfather, then the grandmother,

(1) *Nash v. Cutler*, 16 Pick. 491.

(2) N. H. Rev. St. 331.

(3) *Parker v. Nims*, 2 N. H. 460.

(4) Con. St. 204-5; *Ib.* 34-5.

(a) A testator died in 1817, leaving a daughter, to whom he devised land. She died in the year 1826, leaving her mother and sister surviving her. Held, her property could not be regarded as a deceased child's share in the estate, according to the act of July 2d, 1822, as the will had taken effect before the passage of the act, but must be considered as intestate estate, the disposition of which was the same by the act of 1822 as by that of 1789, and that her mother was entitled to her property, as her next of kin. *Bell v. Scammon*, 15 N. H. 381.

uncles and aunts, on the same side, and their descendants; then to the great grandfathers, or one of them, if only one; then to the great grandmothers, or one of them, if only one, and brothers and sisters of grandparents, and their descendants; and so on; passing to the nearest lineal male ancestors, then the lineal female ancestors in the same degree, and their respective descendants. But no one, except children, shall inherit, unless in being, and capable of taking at the intestate's death. Where the inheritance is above directed to go by moieties to the paternal and maternal kindred, if there are none on the one part, the whole passes to those on the other; if no kindred, to the husband or wife, his or her kindred.^(a) The descendants of one deceased inherit as he would have done. Where one dies without children, real estate derived by descent, gift or devise, from a relation, passes to the next of kin of the intestate of the blood of such relation.⁽¹⁾

77. In Vermont, by the Revised Statutes, for want of children, or their representatives, the widow takes one-half the estate in fee; if no widow, the father inherits; then brothers and sisters, and the mother, and their legal representatives; then the next of kin, and representatives. And for want of heirs, the widow takes the whole. If no widow, the property escheats to the town for the benefit of schools.^{(2)(b)}

78. In New York, real estate descends: 1. To lineal descendants; 2. To the father; 3. To the mother; 4. To collateral relatives, subject to the following conditions. For want of lawful descendants, the father takes, unless the estate came to the intestate on the part of the mother. If no father, or if he cannot take, the mother takes for life, and the reversion passes to brothers and sisters,^(c) and the descendants of such as are dead. If no brother or sister, or their descendants, the mother takes one-half, if the deceased left a widow—if not, the whole. If no father or mother, capable of inheriting, collateral relatives take.

(1) R. I. L. 222-3. See *Mowry v. Staples*, | (2) 1 Verm. L. 348, 359, 360; Rev. St. 292.
1 Aug. 10.

(a) No preference is given to one line over the other, as between paternal and maternal kindred, but each moiety is distributed as a distinct estate. *Cozzens v. Joslin*, 1 R. I. 122.

While there is any kindred, however remote, on the part of the paternal line, they take one moiety; and the inheritance, after being once divided, cannot be reunited and descend in one line, until there ceases to be a representative of the other. *Cozzens v. Joslin*, 1 R. I. 122.

(b) By act of 1850, (p. 8,) if an intestate leave no issue, his widow takes all his estate absolutely, if it do not exceed \$1,000; if it exceed that sum—\$1,000, and half the remainder—the other half to descend as if there were no widow. If there is no kindred, the wife takes the whole. If no administrator be appointed upon the estate of a deceased person, his heirs may maintain ejectment, for land to which he had title, without an order of distribution by the Probate Court. *Buck v. Squiers*, 22 Verm. 484.

The kindred of the half-blood, on the mother's side, inherit equally, with the kindred of the whole blood, in the same degree. *Hatch v. Hatch*, 21 Verm. 450.

If a person die, leaving no widow, issue, father, mother, brother, or sister, but leaving children of his deceased brothers and sisters, and also grandchildren of deceased brothers and sisters, whose parents are also dead; his estate must be divided equally among all the children of his deceased brothers and sisters, to the exclusion of the grandchildren. *Ib.*

The term "relatives," as used in the fifth rule for the distribution of estates, (Rev. Sts. 292,) relates only to such relatives as are specifically named in the fourth rule, and not to the words "representatives of any deceased brother and sister," used in that rule. The rule was intended to apply only to cases where some of the brothers and sisters were still living. *Ib.*

(c) Descent to a brother is *immediate*, and not affected by the alienage of the father. The same rule applies between one brother and the representatives of the other, and between the representatives of both. *McGregor v. Comstock*, 3 Comst. 408.

The rule of representation extends to the descendants of brothers and sisters, indefinitely, if of unequal degree. For want of the above kindred, the estate passes, if it come from the father: 1. To brothers and sisters of the father, or those who are living, and the descendants of those who are dead, or if all are dead, to their descendants, in the same manner as if such brothers, &c., had been the brothers, &c., of the intestate. 2. Then to the brothers, &c., of the intestate's mother, and their descendants, (as in the last clause.) But if the estate came on the part of the mother, the two last degrees are reversed. If neither on the part of the father nor mother, these degrees share equally. The whole blood and half-blood of the same degree, and their descendants, inherit equally; unless in case of an estate which came by descent, devise or gift, from an ancestor, and which does not pass to any one not of his blood.(1)

79. In New Jersey, in default of issue, a brother or sister of the whole blood, or issue of such brother, &c., and father; the mother takes for life, and afterwards such kindred as would have inherited, if the intestate had left no mother. If no mother, the brothers and sisters of the half-blood inherit; and, in case of the death of such brother, &c., before the intestate, the child, or children of such brother, &c., take his share; and in case of the death of any child of such brother, &c., before the intestate, the child or children of such child take. But where an estate came from an ancestor by descent, devise or gift, no one shall inherit who is not of the blood of such ancestor. Remote relations, beyond brothers and sisters, and their issue, share equally, if of equal degree of kin. But no one inherits an estate acquired from an ancestor by descent, devise or gift, unless of the blood of such ancestor; provided there is any person of such blood capable of inheriting.(2)(a)

80. In Pennsylvania, for want of issue, the widow takes one-half of the real estate for life. (See *Dower*.) If no widow, nor issue, the father and mother take for life. Where there are brothers and sisters of the whole blood, but no children of a deceased brother, &c., of the whole blood, the brothers and sisters inherit. On the other hand, children of one deceased of the whole blood inherit, where there is no brother, &c., of the whole blood. Where there is neither brother nor sister of the whole blood, nor any nephew or niece, the child of such deceased brother, &c., the next of kin inherit, being the descendants of brothers and sisters of the whole blood. In default of brothers, &c., of the whole blood, and their descendants, the estate descends to the father and mother, or one of them, if the other be dead. Then to brothers, &c., and their issue, of the half-blood. Then to the next of kin. Where an estate has come by descent, devise or gift, from a relation of the intestate, it does not pass to any one not of the blood of such relation.(b)

(1) 1 N. Y. Rev. St. 751-3. See *Torrey v. Shaw*, 3 Edw. 356.

(2) N. J. L. 1838, 85, 86, 87, (repeals Jan. 29, 1817, secs 5, 6, 7.)

(a) Lands escheat, in case of the death of the owner, intestate, and without heirs, and the title vests in the State *instantly*; so that the Orphans' Court has no power to order the same to be sold for payment of debts. *Den v. O'Hayley*, 1 N. J. 582.

(b) See *Burr v. Sim*, 1 Whart. 252. Where an intestate died, leaving, as his nearest relatives, brothers and sisters of the half-blood by the mother's side, and cousins who were children of deceased brothers of his father, the mother being a descendant from the intestate's great-grandfather, and the real estate of the intestate having been derived from his great-grandfather and his grandfather; held, the half-brothers and sisters were entitled to such estate in equal portions, in preference to the cousins. *Hart's, &c.*, 8 Barr, 32.

For want of kindred, a husband or wife inherits. And whereas it is intended that the heir at common law shall not take, to the exclusion of others, related in equal degree; the next of kin, except as above provided, shall always inherit, without regard to the relation from whom the estate came. The above provisions apply to the surplus proceeds of lands sold for payment of debts. Every heir must claim his share within seven years from the death of the intestate, or, if an infant, or *feme covert*, from removal of such disability. (1)(a)

81. In Maryland, estates descend to children and their descendants, equally. Then, if the estate descended to the intestate on the part of the father, to the father, and if none living, to brothers and sisters of the blood of the father, and their descendants, equally; (b) then to the grandfather, on the part of the father, or his descendants, equally; and so on, to the next lineal male paternal ancestor, or his descendants. If none, to the mother of the intestate, or her descendants, or the maternal ancestors and their descendants, as above. And if the estate descended to the intestate on the part of the mother, the same order is observed, with a substitution in degrees of the maternal for the paternal relations. If the estate came by purchase, it descends, for want of children, &c., to brothers and sisters of the whole blood, and their descendants; then to those of the half-blood; then to the father; then to the mother; the paternal grandfather, or his descendants; the maternal grandfather, or his descendants; and so on, alternating the next male paternal ancestor, and his descendants, and the next male maternal ancestor and his descendants, with a preference to the former. For want of such kindred, to husband or wife, his or her kindred, as in case of purchased estates;

(1) Parke & J. 285-8. See *Maffit v. Clark*, 6 Watts & S. 258; *Baker v. Chalfaut*, 5 Whart. 477.

(a) In Pennsylvania, a *testator* as to real estate is to be regarded as speaking in reference to the common law system of descent. Per Bell, J. *George v. Morgan*, 4 Harris, 95; *Worrall v. Morgan*. 1b.

A remainder in fee, expectant upon a freehold estate acquired by purchase, will pass by descent to the heirs of the person seized in remainder. *Vanderheyden v. Crandall*, 2 Denio, 9.

Where real estate is sold, by the committee of a lunatic, under the decree of court, for the payment of his debts, the surplus money, after payment of such debts, still remains real estate, and is distributed as such according to the rules of descent. *Lloyd v. Hart*, 2 Barr, 473.

By statute of 1850, (p. 581,) the widow or children of one deceased insolvent may retain real or personal estate to the amount of three hundred dollars.

A case stated between the parties to an action of ejectment, alleging that the lineal and collateral heirs of a deceased intestate, the former owner of the estate, became extinct, so far as the parties know, will support a judgment in favor of one of the parties as next of kin to the intestate, under the Pennsylvania statute of descents of 1833; without regard to the ancestor, or other relative, from whom the estate came. *Dowell v. Thomas*, 1 Harr 41.

A testator devised property, in trust for his daughter for life, and after her death, in trust for the use of such persons as she should appoint. The daughter devised the property to her brothers and sisters, being lineal descendants of her father. Held, the property passed to her brothers and sisters by the will of her father, and was not liable to taxation under the act of Pennsylvania, taxing collateral inheritances. *The Commonwealth v. Williams*, 1 Harris, 29.

(b) The right of representation does not extend beyond the children of brothers and sisters. Hence, if the intestate leave an aunt, and also the children of deceased uncles and aunts; the aunt takes the whole. *Porter v. Askew*, 11 Gill & J. 346. See *Brown v. Ramsey*, 7 Gill, 347.

and, if the intestate has had more than one husband, &c., all deceased, then to their kindred equally.(1)

82. In construction of this statute, it has been held, that, as at common law, a descent to a brother of a purchased estate is *immediate*, and not *from* or *through* the parents. (So the descent from child to parent.) Hence, the statute has not provided for the descent of an estate which came from a brother or child; and such estate descends as at common law. But a subsequent case has decided, that descent to a brother is *mediate*.(2)

83. In the same State, it is said that, where a statute speaks of one's dying *intestate*, it applies to cases of a void will, a will void in part, and a will which gives the same quantity, quality and mode of estate, that the devisee would have taken without it.(3)

84. In Delaware, lands descend to children and their issue; then to brothers and sisters of the whole blood, and their issue; then to those of the half blood, and their issue. For want of brothers and sisters, and their issue, to the father; then to the mother; then to the next of kin, and the lawful issue of the deceased next of kin. If there be no child or lawful issue or a child, the widow takes one-half for life; otherwise, one-third. If no kindred, she takes the whole. Property, derived by descent or devise from an ancestor, passes to brothers and sisters, and their issue, of the blood of such ancestor; if none, it passes like other property. The issue of relations, in all cases, take by representation. Collateral heirs claiming through the nearest ancestor are preferred.(4)

85. In North Carolina, inheritances lineally descend to the issue of him who died last actually or legally seized, forever; but shall not lineally ascend, except as afterwards provided. Females and males inherit equally; also younger and older children. The lineal descendants of a person deceased represent their ancestor, and stand in his place. Failing lineal descendants, and where the land has descended, or been derived by gift, devise or settlement, from an ancestor, to whom a person thus advanced would, upon the ancestor's death, have been an heir, the land descends to the next collateral relations of the person last seized, who were of the blood of such ancestor. Failing lineal descendants, and where the land has not been transmitted as aforesaid, or where, if it has, the blood of the ancestor is extinct, the estate descends to the next collateral relations of the person last seized, whether of the paternal or maternal line. The whole and half-blood collateral relatives take equally. Degrees of relationship are reckoned as at common law; except, that for want of issue, brother or sister, or their issue, the estate vests, *for life*, in the parents, or that one who is living, and, on the death of one, in the survivor, and afterwards is transmitted according to the foregoing rules. For want of kindred, the widow inherits.(5)(a)

(1) Md. St. 1786, ch. 45. See 8 Gill & J. 1.

(2) *Barnitz v. Casey*, 7 Cranch, 456; *Stewart v. Jones*, 8 Gill & J. 1.

(3) *Medley v. Williams*, 7 Gill & J. 61.

(4) Dela. St. 315-6; St. 1843, 488-9; Rev. Sts. 277.

(5) 1 N. C. Rev. Rev. St. 236-7. See *Bell v. Dozier*, 1 Dev. 333; *Alston v. Alston*, 7 Ired. 172.

(a) It has been held, in this State, that on failure of lineal descendants, an inheritance, descended or devised from a grandfather, goes to the next collateral relation of the person last seized, of the blood of such ancestor, though a cousin, rather than to a half-brother *ex parte materna*. *Felton v. Billups*, 2 Dev. & B. 308. In case of an estate transmitted by descent,

86. In South Carolina, the constitution requires, that the legislature shall abolish primogeniture, and provide for the equal distribution of estates.(1) By the statute of descents, primogeniture is abolished. Estates descend to children and their descendants, by representation,(a) (except one-third to the widow;)(b) then to the father; then to the mother; then to brothers, &c., of the whole blood, and their children; then to brothers, &c., of the half-blood, and children of those of the whole blood, deceased, by representation; if no brother, &c., of the half-blood, then to the children of the deceased brother, &c.; if no child of a deceased brother, &c., of the whole blood, then to brothers, &c., of the half-blood; then to the lineal ancestor or ancestors; (in all the above cases, failing issue, one-half to the widow,) then, two-thirds to the widow, and the remainder to the next of kin. A husband takes the same share above provided for the widow. By a subsequent act, if one leave no widow or lineal descendants, the father inherits, or, if he tion, share the mother, brothers and sisters and their issue, by representation be dead, equally. But where there is a mother, and also a brother of the half-blood, the former takes the whole.(2)(c)

87. In Georgia, real estate and personal are placed upon the same footing. The order of descent is as follows: 1. Children. 2. Parents,

(1) Const. S. C. art. 10, sec. 5; 1 Brev. v. Gadsden, 2 Bay, 293; Rochell v. Tompkins, Dig. 422-30. (See the notes to this statute, for valuable exposition of its various provisions. Watson v. Hill, 1 McCord, 161; Poaug 1 Strobb. Equ 114.
(2) 1 McCord, 456.

the blood of the ancestor who acquired it being extinct, if the owner dies without issue, it descends to his nearest collateral relatives. Thus, if it came from a maternal ancestor, it passes to a half-brother and two sisters on the father's side. *University v. Brown*, 1 Ired. 387. A died in 1777, leaving two sons, B and C, and B, by the law as it then stood, being his sole heir. A devised his property to C, who died in 1839, leaving a sister of the whole blood, and children of a maternal sister of the half-blood. Held, such children took half the estate. *Burgwyn v. Devereux*, Ib. 583. The purchaser of land died intestate, leaving two minor children, both of whom died intestate, without issue, and the latter of them leaving neither mother, brother, nor sister. His guardian sold the land under order of court, during his life. He left a paternal grandfather and maternal grandmother, one paternal and several maternal aunts, children of the grandmother by a second marriage. Held, the proceeds of sale, as the land itself would have gone, went next to the paternal aunt. *Gillespie v. Foy*, 5 Ired. Equ. 280.

Where personal estate was given to the testator's daughter, and, in case of her death without children, then to the testator's next of kin, and the daughter died in the lifetime of the testator, leaving other children of the testator surviving, and also grandchildren of the testator, being the children of another deceased child of the testator; held, that such grandchildren were not entitled to any part of the personal estate, not being the "next of kin." *Simmons v. Gooding*, 5 Ired. Equ. 382.

On the death of a person who had received personal property from the intestate estates of his father and sister, the latter of whom received her's from her father, leaving, as his nearest of kin, a paternal grandfather, a paternal and maternal grandmother, one paternal aunt, and several maternal aunts, the children of the grandmother by a second marriage; the grandfather and grandmother take equally, to the exclusion of the aunts. *Gillespie v. Foy*, 5 Ired. Equ. 280.

(a) Not expressed as *for life*.

(b) If heirs take by purchase, they take *per capita*. *Campbell v. Wiggins*, Rice, 10. Grandchildren take *per stirpes*, under the act of 1791. *Payne v. Harris*, 3 Strobb. Equ. 39.

(c) By a late statute, (1851, p. 80,) in case of no lineal descendant, but a widow and father or mother and brother and sister, or brother or sister of the whole blood; the estate goes one moiety, to the widow, the other moiety equally divided between these before-mentioned, or the remainder of them, the father being dead, children of a deceased brother or sister taking by representation. Under the act of December, 1797, brothers and sisters are to be understood as those of the whole blood.

brothers and sisters equally. 3. Cousins.(a) If the intestate leave a widow, and child or children, they draw equal shares thereof, unless the widow claims dower, in which case she takes nothing further from the real estate. The lineal descendants of deceased children stand in their place. If there is a widow and no child, or representative of a child, the widow takes one moiety, the next of kin and their representatives the other. If no widow, the whole goes to the child or children. If no issue, the father, or, if he be dead, the mother, takes like a brother or sister; unless the mother have intermarried, in which case she shall not inherit to her child dying without issue, unless it be the last or only child; but the next of kin on the side of the father will take. If one die without issue, leaving brothers or sisters of the whole and half-blood, such brothers and sisters in the paternal line only inherit equally; but, if there be no brother or sister, or issue of brother or sister, of the whole or half-blood, in the maternal line, then those of the half-blood and their issue in the maternal line inherit.(1)

88. In Alabama, lands descend: 1. To children and their descendants in equal parts—the descendants of the deceased child or grandchild to have the share of their parent in equal parts among them. 2. Brothers and sisters and their descendants, in equal parts—the descendants of a brother or sister to have, in equal parts among them, their deceased parent's share. 3. If no children or their descendants, no brothers or sisters or descendants of them or any of them, to the father. 4. The mother. 5. Next of kin. There shall be no representation among collaterals, except with the descendants of brothers and sisters. The whole blood take before the half-blood, in the same degree. If there are no children or their descendants, the widow takes one-half of the estate for her dower. If there are no brothers and sisters or their descendants, father or mother; paternal and maternal uncles and aunts inherit.(2)(b)

89. In Virginia, for want of issue, the father inherits, excepting maternal estates, which pass to the mother. In default of the father, the

(1) Prince, 234; Ga. St. 1843, 125-6.

(2) Aik. Dig.; Deloney v. Walker, 9 Por. 497.

(a) A note to the Statute (Prince, 234, n.) arranges the degrees thus: 1. Widow and children, or other lineal descendants. 2. Brothers and sisters of the whole blood, and those of the paternal half-blood, (or children of the father by a former wife,) and their children. 3. Brothers and sisters of the maternal half-blood, and their children; the father or mother to take with those in the second or third degree, (as stated in the text,) according to circumstances. 4. First cousins. (After the fourth degree, the English or canonical mode of computation is adopted.) 5. Grandfathers and uncles or aunts. 6. Great-grandfathers, great-uncles, children and grandchildren of great uncles; children of first cousins, and grandchildren of brothers, &c.

An intestate left a wife and no children, but grandchildren, whose fathers died before the intestate. Held, they took *per stirpes*. Odam v. Caruthers, 6 Geo 39.

(b) A mother died, leaving issue a child, after which her father died intestate, and then the child died. Held, the father inherited his child's portion of its grandfather's estate. Fowler v. Trewbit, 10 Ala. 622.

A father, by a deed made in Virginia, conveyed certain slaves to his daughter A, and her husband, during their lives, and at their death "to be returned and delivered to the right heirs of said A." A and her husband removed to Alabama, and died there without leaving children. Held, that the law of Alabama, and not that of Virginia, ascertained who were the heirs of A. Price v. Tally, 10 Ala. 946.

A statute, giving an alien woman the right to inherit from her uncle, also an alien, in the same manner as if he, her mother, and herself were citizens, does not give the capacity of inheritance to other relatives, who are also aliens. Congregational, &c. v. Morris, 8 Ala. 182.

mother and brothers and sisters share equally. Nephews and nieces take, in exclusion of uncles and aunts. Collaterals of the half-blood take half portions. An *ancestral* estate passes exclusively to the blood of the ancestor, till they are exhausted.(a) A grandmother is postponed to an aunt, but a grandfather is preferred to an uncle or aunt. In default of nearer heirs, the estate passes to great-grandfathers, and, in default of them, to great-grandmothers, the brothers and sisters of them respectively, and their descendants. For want of kindred, to husband or wife, and their relations.(1)

90. In Mississippi, lands descend to children and their descendants; the descendants of a deceased child or grandchild taking the share of their parent in equal parts; then to brothers and sisters and their descendants, the descendants of one deceased taking his or her share; for want of children or descendants, (brothers, &c.,)(b) to the father; then to the mother; then to the next of kin. There is no representation among collaterals, except with the *descendants* of brothers and sisters. Kindred of the whole blood are preferred to those of the half-blood *in the same degree*. There is no other distinction. For want of children and their descendants, the widow has one-half for dower; (whether for life, *qu?*) If there are no relations, a husband or wife inherits.(2)

91. In Kentucky, lands descend to children or their descendants; the father; the mother, and brothers and sisters, and their descendants. Failing these relations, the estate is divided into two moieties, one passing to the paternal, the other to the maternal kindred. 1. To the grandfather; 2. Grandmother, uncles and aunts on the same side, and their descendants; 3. Great-grandfathers, or one of them, if but one; 4. Great-grandmothers or mother, and brothers and sisters of grandfathers and grandmothers, and their descendants—always passing to the nearest lineal male ancestors, and, for want of them, to lineal female ancestors in the same degree, and their descendants. For want of paternal kindred, the estate descends to the maternal, and *vice versa*. For want of kindred, the wife or husband, or their kindred inherit. In the ascending and collateral lines, the half-blood take half shares. If there are no whole blood relations, the half-blood take whole shares, but *ascendants* double portions.* Where one dies an infant, without issue, if the estate came from his father, it shall not descend to the mother, if the intestate leave a brother or sister, or a brother or sister of the father, or a lineal descendant of either of them; with a saving of dower. So *vice versa* as to the father, if the estate came from the mother; with a saving of curtesy.(3)(c)

(1) 4 Kent, 392-8, 402-3-4-7. (See, for a complete exposition of the statutory provisions, *Davis v. Howe*, 6 Rand. 355. Also, *Browne v. Turkerville*, 2 Call, 390; *Chapman v. Chapman*, 1 Munf. 399.)

(2) Missi. Rev. C. 41-2. See *Fatheree v. Fatheree*, Walk. 311; Miss. L. 176, 187.

(3) 1 Ky. Rev. L. 560-1-2; *Shelby v. Shelby*, 1 B. Monr. 270.

(a) It seems, the rule *seisina facit stipitem* is abolished. 1 Lomax, 594.

(b) Not expressed.

(c) This provision does not apply to an estate, which came to the deceased child from its maternal grandfather. *Turner v. Patterson*, 5 Dana, 297. See *Gill v. Logan*, 11 B. Mon. 231.

Heirs are entitled to the rents and profits of the real estate descended, until deprived thereof by a decree of court. *Hobson v. Yancey*, 2 Gratt. 73.

By the *Code*, (p. 516,) real estate descends in the following order: To children and their descendants; father, mother and brothers and sisters and descendants; then to be divided

92. In Tennessee,(a) the rule of *representation* applies to collateral descendants more remote than the children of brothers and sisters. If there is no child, brother or sister, or their lawful issue, the estate goes to the parent from whom it came; or, if such parent be dead, to the other parent. A *purchased* estate passes to the father; if no father, to the mother, for life; then to the heirs on the part of the father; and if none, to those on the part of the mother. Lands inherited from the father pass to the collateral relatives on the father's side, not to the mother for life. Where an estate descended from the part of the father, brothers, &c., of the half-blood in the paternal line, and their issue, exclude those in the maternal line; and so *vice versa*, where the estate came by the mother.(b) The half-blood share equally with the whole blood. An alien heir, a resident of the State at the death of the ancestor, shall hold and transmit the estate by descent, &c., provided within one year he declares his intention to become a citizen. Where real estate has escheated, an alien heir may recover it, if there are no resident heirs in the United States.(1)

93. If any brother or sister have died in the life of the intestate, leaving issue, such issue shall represent their deceased parent. Under this clause, it has been held, the intestate having left, as her heirs, the child of one deceased sister, and four children of another deceased sister, that the parties took *per stirpes* and not *per capita*, notwithstanding they were all equally *next of kin* to the intestate.(2)

94. In Ohio, *ancestral* property is that which came from an ancestor in consideration of blood, by descent, devise or gift, and for no pecuniary equivalent. For want of children, property descends to brothers and sisters and their issue—the ancestral, to the whole and half-blood

(1) 1 Scott, 292, 293, 562; Ten. St. 1821. p. 23; Sts. 1848, 264; 1851-52, 181; 4 Kent, 394, n.; Roberts v. Jackson, 4 Yerg. 308; Nichol v. Dupree, 7 Yerg. 415. See Guion v. Buxton, 1 Meigs, 365; Hoover v. Gregory, 10 Yerg. 444; 2 Humph. 584.

(2) Lewis v. Claiborne, 5 Yerg. 369.

between paternal and maternal kindred; first, to the grandfather, grandmother, uncles and aunts on the same side, and descendants; great grandfathers or father; great-grandmothers or mother, brothers and sisters of grandfathers, grandmothers and their descendants; and so on without end. If no paternal kindred, then to the maternal, and the reverse. If neither, to husband or wife, if any, or if dead, his or her kindred. Collaterals of the half-blood take only half as much as those of the whole. If all are of the-half blood, the ascending kindred to take double portions. The division is *per capita*, where all are of the same degree, otherwise *per stirpes*. It is no bar to one claiming as heir, that one or more, through whom he claims, are aliens. The estate of a minor, derived by descent from a parent, shall pass to the same branch.

In Texas, (Sta. 1848) where one dies without leaving husband or wife, the estate descends to children and descendants; father and mother equally; if only father or mother, such survivor takes one-half, brothers and sisters the other, and their descendants, if any; if none, then the whole passes to father or mother. If no father or mother, to brothers and sisters. If none, one moiety to paternal, the other moiety to maternal kindred. Grandfather and grandmother take in equal portions. If only one is living, the share of the deceased goes to his or her descendants, if any; if none, to such surviving grandfather or grandmother. Where there are children or their descendants, a surviving husband or wife shall take a life estate in one-third of the real estate; if no child, &c., then one-half shall vest in the husband or wife surviving. Persons in being only shall inherit, except children of the deceased. The half-blood of collaterals take half as much as the whole blood.

(a) Previous to 1796, in North Carolina, male relations were preferred to female of the same degree.

(b) Where a mother purchased land, taking the conveyance to herself for life, then to her child; upon the death of such child, held, this was an estate *derived from the mother*, and passed to her; thus giving her the fee-simple. Haywood v. Moore, 2 Humph. 584.

equally, if of the blood of the intestate's ancestor—the non-ancestral, to brothers and sisters, and their issue, of the whole blood, if any; if none, to those of the half-blood. Property next descends, if ancestral, to the ancestor from whom it came; then to his children, or their issue, his brothers and sisters and their issue, brother and sisters of the half-blood of the intestate, and the next of kin of the intestate, if of the blood of the ancestor. Non-ancestral passes to the father, mother, or next of kin. The rule of representation applies only to lineal descendants, and the brothers and sisters of the intestate, or the ancestor. For want of kindred, the property goes first to the husband or wife, then to the State.(1)(a)

95. In Illinois, property descends, first to children and their descendants; if none, and no widow, to parents, brothers and sisters, and their descendants, each parent taking a child's share; or, if one be dead, the survivor a double share.(b) If no parents, to the brothers and sisters of the intestate, and their descendants; if no children, or their descendants, one-half to the widow in fee. If there are none of the above-named relatives, and no widow, then to the next of kin, by the civil law. No representation is allowed beyond brothers and sisters, and no distinction between the whole and half-blood. If a wife dies, leaving no child or descendant of a child, the husband inherits one-half her estate.(2)

96. In Missouri, property descends: 1. To children or their descendants; 2. Father, mother, brothers and sisters, and descendants; 3. Grandfather, grandmother, uncles and aunts, and descendants; 4. Great-grandfathers and mothers, and brothers and sisters of grandfathers and mothers, and descendants—passing to the nearest lineal ancestors and their children, and their descendants. The limitation is always "in equal parts." If there are no kindred, the husband or wife takes; if none, his or her kindred. Of the ascending and collateral kindred, the half-blood take only half of a share; if none other, a whole share. Ascendants take double portions.(3)

97. In Indiana, lands descend to children and their descendants; then one-half to the father, the other to brothers and sisters or their descendants; or, if no father, then to the mother, brothers, &c.; one-half each. If no father or mother, to the brothers, &c.; if no brothers, &c., or their descendants, to the father; if dead, to the mother. In each case, subject to the election on the part of the widow between one-third of the estate in fee, subject to debts, or her dower. If the wife has deceased, leaving children by a prior marriage, such children or their descendants take one-third. Half-brothers, &c., or their descendants, take half shares; if there are none of the whole blood, (such is presumed to be the meaning, though very inaccurately expressed,)

(1) Walk. 332, 334, 335, 336, 337. See 6 Ohio R. 122.

(2) Illin. Rev. L. 625; St. 1842-43, 319.

(3) *Ravenscroft v. Shelby*, 1 Mis. 694; *Misso. St.* 222, 223. See *McReynolds v. Gentry*, 14 Mis. 495.]

(a) By statute of 1853, (p. 490,) land coming by descent or the gift of an ancestor descends to children; then to the family of such ancestor, the whole and half-blood equally. If the ancestor is dead, to his wife or her husband for life. There may be other slight modifications of the rule stated in the text.

(b) It has been held, that, agreeably to the computation of the civil law, the mother will take in preference to brothers and sisters. *Hays v. Thomas*, Bre. 136.

they take the whole. Where there are no issue, and an estate comes to the intestate from his father, his mother, or any of her children by another marriage, shall, if the intestate has left a brother, sister or their descendants, inherit only half the portions above assigned them; or, in case of the mother, at her option, the dower which she may have therein. So with the father, *vice versa*. If there be no issue, father, mother, brother, or sister, whole or half, or descendants; one-half descends to the paternal, the other to the maternal kindred; first to the grandfather, then the grandmother, then uncles and aunts and their descendants; the widow being entitled to two-thirds. If the wife be dead, leaving children by a former marriage, they take one-half. If no issue, father, &c., brother, &c., nor their descendants, grandfather, &c., uncles, &c., in the paternal line, nor their descendants, great-grand parents and great-uncles and aunts, and their descendants, the estate allotted said line goes to the widow—if none, to the children of a deceased wife by a former marriage, or other descendants. So with the maternal line. For want of all these, the property escheats. A husband takes in fee the same interest that his wife would if she survived him—as her heir; and also curtesy in the residue.(a)

98. In Arkansas,(1) lands descend to the father, mother, brothers and sisters, grandfather, grandmother, uncles, aunts and descendants, in equal shares without end; passing to the nearest lineal ancestor, and his or her children and descendants, equally. If no relations, the husband or wife inherits. The right of *representation* seems to be indefinitely extended. If there are no *descendants*, and the estate came from the father, it passes to him and his heirs; if from the mother, to her and her heirs. If newly acquired by the intestate, to the father for life, then to collateral kindred, as above stated; if no father, to the mother for life, then to the collateral heirs. If no father or mother, to brothers, &c., and their descendants from the father, then from the mother; in case there are no nearer kindred. The half-blood inherit, as also their descendants, unless the estate is *ancestral*. If so, none inherit but those of the ancestor's blood. The common law prevails, except so far as hereby modified.

98 a. In Michigan, where one dies *sole* and a minor, his brothers and their representatives, otherwise they take with the mother.(2)

98 b. In Wisconsin, real estate descends to children in equal shares, or their issue by right of representation. If no child, to lineal descendants, *per capita*, where they are of the same degree, otherwise, *per stirpes*. If no issue, then to the widow for life, and the father afterwards; if no widow, to the father; then to brothers and sisters, and mother; then to the next of kin claiming through the nearest ancestor. Where a minor dies unmarried, leaving estate inherited from his parent, it goes to children of the same parent, or to the parent or issue of the same parent. The widow takes all, if there are no kindred.(3)

(1) Ark. Rev. St. 328-9-30.

(2) Mich. L. 64, 5.

(3) Wis. Rev. Sts. 338.

(a) Brothers and sisters of the half blood inherited, under the act of 1818, as in 1831, the estate of a deceased brother, equally with brothers and sisters of the whole blood. *Moore v. Abernathy*, 7 Blackf. 442.

98 c. In California, where a husband or wife leaves one child, the estate descends equally to such child, and the surviving wife or husband. If there are more children than one, the husband or wife takes one third: the children or grandchildren, by representation, two-thirds. If no child, then to husband or wife, mother and father equally; if no husband or wife, to the father alone; if no father, to brothers and sisters and nephews and nieces, by representation. A mother takes equally with brothers and sisters. If no brothers, &c., to the mother, excluding the issue of deceased brothers, &c. If no husband or wife, father, mother, brother or sister, the husband or wife takes all. Then the next of kin, preferring those claiming through the nearest ancestor. Where a minor dies, who inherited from a parent, such inheritance goes to children in the same line, if any; otherwise, to other children. The civil law degrees are adopted. The half-blood share equally. The provisions as to husband and wife apply only to separate property.(1)

98 d. In Iowa, real estate descends to children equally, or the children or a deceased child, by representation. If no issue, half the estate goes to the widow, half to the father; if no wife, the whole to the father; if no father, to the father's heirs; if no heir of the father, to the heirs of the mother; if none, to the wife or her heirs. In default of heirs, the property escheats. Bastards inherit from and to the father. The father of a bastard may recognize, and thus make the child his heir. In inheriting from a bastard, the mother has preference to the father.(2)(a)

99. Chancellor Kent says, that universally, in this country, a *posthumous* child inherits as if born in the parent's life.(3)(b) In Ohio, Illinois, Massachusetts, Alabama, New Hampshire, Indiana, Arkansas, Virginia and New Jersey, it is expressly provided, that posthumous children shall inherit like others. So in Tennessee, unless either provided for or disinherited, and not merely omitted in the will. In Missouri, Rhode Island, and Kentucky, the same principle is recognized by the provision, that no person, except children, shall inherit, unless in being, and capable of inheriting at the death of the intestate. In Pennsylvania and New York, *descendants and relatives*, begotten before, and born after the intestate's death, inherit like others. (Whether the word *relatives* applies to any but children, *qu.*)

100. In Delaware, "an infant in the mother's womb is regarded as a living child;" and shall take by any mode of transmission, if born alive; if not, the effect is the same, in all respects, as if it never existed.(4)

(1) California Comp. Sts. 186.

(2) Iowa Code, ch. 83.

(3) 4 Kent, 412; Walk. 333; 1 N. J. L. 392-3, 608; Illin. Rev. L. 627; Misso. St. 223; Mass. Rev. St. 415; Aik. Dig. 449; N. H. L. 255; R. I. L. 223; 1 Ky. Rev. L.

561; Parke & J. 287; 1 N. Y. Rev. St. 754; Ind. Rev. St. 236; 1 Lom. Dig. 600-1; Ten. St. 1836, 250; Ark. Rev. St. 328. Morrow v. Scott, 7 Geo. 535.

(4) Dela. St. 314-5.

(a) With regard to the law of descent generally in the north-western States, it is to be observed that the ordinance of 1787 made the following provisions, to which the laws of these States have since substantially conformed: 1. To children and their descendants in equal parts, the descendants of a deceased child or grandchildren to take the parent's share in equal parts; 2. To the next of kin in equal degree; among collaterals, the children of a deceased brother or sister to have their parent's share. No distinction between the whole and half-blood; and the widow to have her third part of the real estate for life.

(b) So a *devise* to children gives such child an equal share. *Pettway v. Powell*, 2 Dev. & B. 312.

101. The principles contained in this provision are thus distinctly laid down in a late case in New York.

102. An unborn child, after conception, is considered to be so far *in esse* as to take an estate, if afterwards born, or to effect any other purpose beneficial to him. But, if born dead, or so early after conception, as to be presumed incapable of living, other parties cannot claim through such child. If born within six months from conception, such incapacity will be presumed.(1)

103. It is the English doctrine, that a posthumous child, claiming *as heir*, is not entitled to the intermediate profits. It has been seen, (Vol. I, *Remainder*,) that the rule is different, where he claims *by remainder*. In New York, a posthumous heir is also entitled to the profits.(2)

104. By the English statute of distribution, (22 and 23 Chas. II,) it is provided, in general, that where a child is *advanced* by the parent in his lifetime, that is, where he receives from the parent any considerable gift or allowance, this amount shall be taken for or deducted from his share in the inheritance. This provision has been substantially re-enacted in all or most of the United States, with slight local modifications. In many of the States, a child has the privilege of throwing into the common stock the property he has received, and thereby entitling himself to an equal share of the inheritance. This is called "bringing into *hotch-pot*." The principle of advancement is generally confined to lineal descendants. It depends upon the joint consideration of the parent's intention, and an equal provision for the children.(3)

105. In Massachusetts,(a) an advancement in real estate is treated as part of the real estate to be divided. So with personal; and if, in either case, it exceed the share of real or personal estate respectively, which the party would have inherited, he is not required to refund, but receives so much less from the other part of the estate, as to equalize his share. A gift or grant is an advancement, if so expressed, or charged by the intestate, or acknowledged by the heir, as such, in writing; which declarations are also conclusive as to the value. The issue of a deceased child are bound by an advancement to him. The same provisions are adopted, substantially, in Maine, applying to children and grandchildren.(4)

106. A debt due from the heir to the intestate is not an advancement. Nor a charge in the form of a book debt.

107. No interest is chargeable on an advancement.(5)

108. It was formerly held, that the statutory formalities prescribed for an advancement were not enumerated for the purpose of excluding others, but only to substantiate certain evidence which might otherwise be doubtful; and that an advancement might be proved, even by parol. But this doctrine has been overruled.(6)(b)

(1) *Marsellis v. Thalhimier*, 2 Paige, 55.

(2) 4 Kent, 388-9 1 N. Y. Rev. St. 754.

(3) 4 Kent, 417-8; *Barber v. Taylor*, 9 Dana, 84; *Sherwood v. Wooster*, 11 Paige, 441.

(4) Mass R. St. 414-5; Me. Rev. St. 380-1.

(See 17 Mass. 356; *Quarles v. Quarles*, 4, 680; *Kenney v. Tucker*, 8, 143; *Whitman v. Hap-*

good, 10, 437; *Scott v. Scott*, 1, 527.)

(5) *Proctor v. Newhall*, 17 Mass. 81; *Ashley, &c.*, 4 Pick. 21; *Osgood v. Breed*, 17, 356.

(6) *Quarles v. Quarles*, 4 Mass. 680; *Osgood v. Breed*, 17, 356; *Bullard v. Bullard*, 5 Pick. 527; *Ashley*, 4, 21; *Bulkeley v. Noble*, 2, 337; *Barton, &c. v. Rice*, 22 Pick. 508.

(a) So in Tennessee. Tenn. St. 1839-40, 83.

(b) In Pennsylvania, the declarations of the parent at the time of the supposed advancement, or the admissions of the child, then or afterwards, are evidence. *Daniel King, &c.*, 6 Whart. 370.

109. In New Hampshire, an advancement consists in a deed of lands, expressed to be for love or affection, or acknowledged in writing by the heir as an advancement; or in personal estate, thus acknowledged, or charged in writing, or a memorandum made of it by the intestate or his order, or delivered expressly as an advancement before two witnesses, requested to notice it. The advancement may be allowed in division of either real or personal estate. It is made to *an heir*, or any one through whom he claims.(1)

110. In Rhode Island, advancement consists in a deed of gift, or the delivery of a personal estate, to a *child or grandchild*; the latter either charged, or a memorandum made of it by the intestate or his order, or delivered expressly for the purpose before two witnesses, called upon to notice it.(2)

111. In Connecticut, an advancement is to be deducted from the share of a child.(3) When a devise is avoided for informal execution of the will, if the same will contains a valid legacy to an heir, this is an advancement.(4)

112. In Vermont, an advancement is either expressed as such, or made for love, &c., or charged or acknowledged in writing, or, if personal estate, delivered before two witnesses. A similar provision in Michigan.(5)

113. In New York, advancement may be made to a child, and it shall also bar the *descendants* of such child. The *value* is fixed by the acknowledgment of the child, if any; if not, it is estimated as at the time of making the advancement.(a) Maintaining or educating a child, or giving him money, with no view to a portion or settlement in life, is no advancement. (So in Ohio and Arkansas.) Every gift by a parent to a descendant, by virtue of a beneficial power, or power in trust, with a right of selection, is an advancement.(6)

114. In New Jersey and Delaware, an advancement consists in lands, tenements and hereditaments, *given or advanced* to the *issue* of the intestate, in New Jersey, or, in Delaware, purchased and paid for by the intestate. So, in Kentucky and Ohio, it consists in real estate. In North Carolina,(b) it must be *in fee simple*.(7)

115. The principle of advancement is also adopted in Indiana,(c) Michigan, Illinois, Missouri,(b) Pennsylvania, South Carolina, Georgia,(b) Tennessee(d) and Maryland. In Connecticut, Illinois, Missouri, Kentucky, Mississippi, Maryland, Georgia, Virginia,(e) Tennessee and North

(1) N. H. Rev. St. 331.

(2) R. I. L. 226; *Ib.* 1826, 636.

(3) Con. St. 204.

(4) *Ib.* 211-12. (See *Porter v. Collins*, 7 Conn. 1; *Clark v. Warner*, 6 Conn. 355.)

(5) Verm. Rev. St. 293; Mich. L. 66.

(6) 1 N. Y. Rev. St. 754; Walk. 334; 4

Kent, 417-18; 2 N. Y. Rev. St. 97. (See *Hawley v. James*, 5 Paige, 318;) Ark. Rev. St. 330.

(7) 1 N. J. L. 608; 1 Ky. Rev. L. 561; 1 N. C. Rev. St. 236; Ohio St. 254; Dela. St. 317-18; Powell v. Powell, 5 Dana, 170; Blackerby v. Holton, *Ib.* 526.

(a) So in Georgia, (Prince, 247,) Michigan and Tennessee; 3 Yerg. 112; Tenn. St. 1839-40, 83; Mich. Rev. St. 269.

(b) *Children*.

(c) *Heirs*.

(d) In this State, the provision applies, where a *child or heir* is advanced, or the person whom he represents, either by testamentary gift, or otherwise. So, also, though a parent disposes of the property under a power or trust, authorizing him to select among his heirs. See *Richards v. Richards*, 11 Humph. 429.

Carolina, the common law term of *hotch-pot* is retained, and the rule, whereby a child advanced may turn in the property given him to the common stock, and then take his share by descent.(1)

116. In Pennsylvania, advancement may be proved by book entries, though the child has no knowledge of them. In case of intestacy, advancements must be brought into *hotch-pot*. But if there is a will, subsequent to the advancements, this is to determine the party's intention; and other evidence is also admissible.(2)

117. In England, the doctrine of advancement applies only to the case of entire intestacy; not where there is a will, and a surplus undisposed of. Chancellor Kent suggests a query, whether the same construction is to be given to the Revised Statutes of New York upon this subject.(3)

118. In Tennessee, an advancement may consist of property purchased by the parent, but directly conveyed to the child.

119. In the same State, a statute of 1784 provided for an advancement, as "lands settled on him or her by the deceased parent." A testator devised all his lands to his younger set of children, and after the date of the will acquired other lands. Held, the devisees could claim no part of the latter, without bringing into *hotch-pot* the lands devised to them; the act being applicable to a provision by will.(4)(a)

(1) Ind. Rev. St. 238; Walk. 334; Illin. Rev. L. 626; Misso. St. 223; 1 Ky. Rev. L. 561; 2, 1071; Md. L. 747; Prince, 247; Burton v. Dickinson, 3 Yerg. 112; Md. St. 1798, ch. 101; Willson v. Jameson, 3 G. & John. 442; Musselman, 5 Watts, 9; Hoak v. Hoak, Ib. 80; Porter v. Collins, 7 Conn. 1; 1 Vir. Rev. C. 357-82; Missi. Rev. C. 42; Daniel King, 6 Whar. 370; Lentz v. Hertzag, 4 Whar. 520; Leverrig v. Rittenhouse, Ib. 130; Haverstock v. Sarbach, 2 W. & Serg. 390; Green v. Howell, 6, 203; Barber v. Taylor, 9 Dana, 85; Nelson v. Brush, Ib. 104; N. C. Stat. 1844-45, 75, 76. See Banton v. Campbell, 9 B. Mon. 587; Youngblood v. Norton, 1 Strobb. Equ. 122.

(2) Hengst's Estate, 6 Watts, 86; Watson v. Watson, Ib. 254. (See Ib. 309.)

(3) Walton v. Walton, 14 Ves. 323; 4 Kent, 419, n.; Hawley v. James.

(4) Haywood v. Moore, 2 Humph. 588; Sturdevant v. Goodrich, 3 Yerg. 95; 2 Ib. 135. *Contra*, 9 Ves. 425; 18, 494.

(a) The subject of *advancement*, in case of a will, will be more particularly considered hereafter. (See *Devise*.)

The following somewhat miscellaneous cases upon this subject, have arisen in the courts of the several States.

In New Jersey, a note given by a son to a father, is not of itself evidence of an advancement. *Batton v. Allen*, 1 Halst. Ch. 99.

A father recovered a judgment against his son, and put the execution in the hands of the sheriff. The son died, and the father wrote an order on the execution, discharging the sheriff from all liability thereon, "the defendant being dead, and no further proceeding required on the same," and afterwards died intestate, leaving a balance of personal estate for distribution, and six children. Three children of the deceased son survived the father. Held, the debt of the son was not discharged; that the debt, with interest, should be added to the said balance, and one-seventh of the whole sum decreed to each of the six surviving children; and that the amount of the debt should make part of the seventh, to be distributed among the children of the deceased son. *Batton v. Allen*, 1 Halst. Ch. 99.

In Pennsylvania, a testatrix bequeathed one-fourth of the residue of her estate to the separate use of her daughter A, and directed that all gifts and advances to any of her children should be deducted from their shares. She had previously loaned A's husband certain moneys, for a part of which a surety was liable. She had, also, after the date of her will, accepted a dividend under a prior assignment for creditors by A's husband. Held, the amount of this indebtedness was not to be deducted from A's legacy, although the testatrix had made no advances to her children, other than these loans, and one of a like nature. *Seagrist's Appeal*, 10 Barr, 424.

In South Carolina, although a parent is entitled to the services of his children while under age, he may waive his right, and make their services the consideration of a contract, and

120. In making allowance for an advancement, improvements made upon the land by the heir are not taken into the estimate.(1)

(1) *Powell v. Powell*, 9 Dana, 13.

may give property *bona fide*, in the performance of such obligation, without the other children being entitled to consider it as an advancement. *Murrel v. Murrel*, 5 Strobb. Equ. 146.

Where elder sons had worked diligently and faithfully for their father when poor, and thus assisted in laying the foundation of his estate, and he expressed his intention to give them more than a child's share, in remuneration of their services, conveyed to them certain lands, and afterwards declared he had fulfilled his intentions; these conveyances were held not to be advancements. *Murrel v. Murrel*, 2 Strobb. Equ. 148.

In Georgia, a widow is not entitled to have advancements, made by the intestate to his children, brought into hotch-pot for her benefit. *Beavors v. Winn*, 9 Geo. 189.

The son of a woman, who was the first wife of a man, who was twice married, claimed certain slaves, which had come to his mother from her father, which her husband had devised to children of his second marriage, and which had been in possession of the devisees for ten years after the death of their testator. Held, he was not entitled to the slaves as heir of his mother. *Cargile v. Harrison*, 9 B. Mon. 518.

A the owner of certain land, divided it into two parts, averring that it was intended for his two sons, B and C. B entered on his part, and soon died, leaving two children, D and E, and a widow, the daughter of F. D died in infancy, unmarried, his sister E and his mother having died before. F filed a bill against the heirs of A, claiming one-half of D's land as his maternal grandfather, and alleging that A's widow was entitled to the other half. Held, as to one-half of D's land, he derived title to it by descent from his sister and mother, and therefore F was not excluded by the fifth section of the Statute of Kentucky, of 1797; as to the other half, as B had no title beyond an equitable right to a deed from A, D's title was derived by descent from A, his grandfather, and therefore F, as his maternal grandfather, was entitled to a moiety of the lands of which D died possessed. *Wells v. Head*, 12 B. Mon. 166.

In Alabama, when advancements to children by a father are brought into hotch-pot by them, the widow of the father will not be entitled to the benefit of them. *Logan v. Logan*, 13 Ala. 653.

And where the decree of the Orphans' Court gives such benefit to her, and this appears on the decree itself, the appellate court will revise the error, although no formal objection was taken below. *Ib.*

The law of Ohio regulating descents and the distribution of personal estates provides for advancements as to real, but not as to personal, estates. *Putnam v. Putnam*, 18 Ohio, 347.

Where a father purchases and pays for land, and directs the conveyance to be made to one of his children, the presumption of law is, that it is intended as an advancement; but this presumption may be rebutted by proof. *Tremper v. Barton*, 18 Ohio, 418.

Where a father gave to his son a remainder in a negro, after the expiration of his own life estate, and afterwards conveyed lands and negroes to his son, in trust, to be divided among his heirs and distributees after his death; held, an advancement. *Raiford v. Raiford*, 6 Ired. Eq. 490.

A father made an advancement to one of his sons, and took from him a covenant, "that he would pay to his brothers and sisters, on a final settlement of his father's estate, without interest, whatever sum or sums of money he had received, if above his ratable part of said estate." Afterwards, the father borrowed a sum of money from his son, not equal to the amount advanced, and gave his bond for it. Held, that the brothers and sisters not advanced had no right to restrain the collection of this bond. *Webb v. Lyon*, 5 Ired. Eq. 67.

Where negroes were delivered by a parent to a son-in-law, at the time of his marriage, and the son-in-law afterwards, in the lifetime of the parent, sold them; held, they were still to be considered as a gift, and that the advancement was to be valued at the time of the delivery. *Hicks v. Forrest*, 6 Ired. Eq. 528.

Where there is a will, and an undisposed-of residue, in the division of that residue among the next of kin, nothing advanced by the testator in his lifetime, nor bequeathed in the will, is to be brought into hotch-pot. *Donnell v. Mateer*, 5 Ired. Eq. 7.

Where a father makes an advancement of a slave to his son, and dies intestate, and the slave has died in the lifetime of the father, the son must be charged with the slave. *Walton v. Walton*, 7 Ired. Eq. 138.

A father put a slave into the possession of his son, not as an advancement, but as a loan. The slave remained several years in the possession of the son, without any claim on the part of the father, and then died, and the father died, intestate. Held, the slave was not an advancement, but that the value of the hire of the slave, while it was in the son's possession, was an advancement. *Hanner v. Winburn*, 7 Ired. 142.

A father sold to one of his sons a tract of land, and took his bonds for the purchase-money. Afterwards, he surrendered one of the bonds to his son, and then died intestate. Held, the amount of the bond so surrendered was an advancement to the son. Ib.

In the case of advancements, in North Carolina, interest should not be calculated on them from the time of the testator's death, as the administrator is not chargeable with interest on the assets, until two years after that period. Ib.

A died, intestate, in 1848, leaving a widow and six children, B, a son, and C, D, E, F, and G, daughters. Three other daughters (H, I and K,) died in his lifetime, each of whom left children, surviving A. A, in his lifetime, gave and conveyed to B two slaves, and a tract of land in fee. The slaves were of less value than one-tenth part of his personal estate, but they and the land together exceeded one-ninth of the whole estate, real and personal. A also, by deed, conveyed certain slaves to his daughters. He also put other slaves, without conveying them, in possession of H, I, and K, and after their death, conveyed them to their children respectively. There was a surplus of money and slaves remaining for distribution. Held, the grandchildren, taking in right of their mothers, were not bound to bring into hotch-pot the slaves put in possession of, but not conveyed to their mothers, but conveyed to themselves, but that they were bound to bring in those conveyed to their mother respectively; that the statute of distributions of North Carolina, was restricted to gifts from a parent to a child, and did not include donations to grandchildren. *Headen v. Headen*, 7 Ired. Eq. 159.

Held, also, under the act of 1844, c. 51, in the distribution of the personal estate of an intestate among his children, or those who represent them, advancements made to one of the children, of real as well as of personal property, were to be brought by such child into hotch-pot, even where the intestate has not died seized of any real estate; and that in this case, B, having received in real and personal property more in value than his share of the personal estate remaining for distribution, was entitled to claim nothing more. Ib.

Held, also, that though the widow was entitled to the benefit of advancements of personalty, made to the children, yet she was not entitled to any benefit from advancements of real property. Ib.

Held, therefore, that, in this case, the widow's share was to be first ascertained, upon the basis of a division of the personalty, by itself, (including partial advancements) between her and all the children, under the act of 1784; and, after taking out her share, that the remaining fund was divisible among the other eight children, or such of them as were not fully advanced, and their representatives. Ib.

CHAPTER LXXVIII.

DESCENT. PARTITION AMONG HEIRS, ETC.

1. General remarks.
2. Partition in New England.
15. In the Middle States.

26. Partition in the Southern States.
27. In the Western States.

1. IN this country, where real estate generally passes, upon the death of an ancestor, to more persons than one, the mode of *partition* among heirs is a matter of considerable importance. The subject of partition, in case of joint tenancy, &c., has been already considered in connection with that particular modification of estate, (vol. I, ch. 55;) and, as the distinction between *co-parcenary* and *tenancy in common* is virtually abolished in the United States, the statutory provisions, heretofore referred to, are probably as applicable, in general, to parties owning in common *by descent*, as to those thus owning *by purchase*. Additional modes of partition, however, are usually provided in the former case, in connection with the settlement of the estates of deceased persons by the *probate courts*; and these require a brief, separate notice.

2: In Massachusetts, co-parceners may have partition in the common law courts; which, after proceedings once commenced therein, shall retain jurisdiction of the case. Partition may also be made, on petition, by the Probate Court, through commissioners, among heirs or devisees, and those claiming under them, after public notice to parties interested. The proceedings are to be the same as in case of partition by a common law court, unless otherwise directed. A guardian is appointed for an infant or insane person. If an heir is the applicant, partition is made of all descended land which he, or any one else interested, requires; if a devisee, of all which he holds jointly with others claiming under the testator, and which he or any other devisee requires to have included. The same rule applies, where one holding under an heir or devisee is the applicant. Partition is made among all the owners, unless a part consent otherwise. If any portion of the property cannot be divided without great inconvenience, the whole may be set off to one or more, (males being preferred to females, and elder to younger sons,) he or they paying an equivalent; till which payment, the partition shall not be established. The return is recorded. The expenses are shared by the parties according to their interests, and execution may issue to recover them. No partition shall be made, where the shares of the parties are in dispute between them, or seem uncertain, depending on the construction of any instrument, or other questions proper for a common law court. Where the deceased held in common, his estate may be divided from that of his co-tenant, before partition is made among heirs, &c.; special notice being first given to such co-tenant, and proceedings suspended in case of his absence. Partition is binding on heirs and devisees and those claiming under them; and on all who have appeared and answered, or assented to the proceedings, or have been duly notified; but upon no others. Title under such partition shall be

held *apparently good*, so as to give one a claim for *improvements*, if evicted.(1)

3. The Probate Court may also make partition of lands held by executors, by virtue of a mortgage to the deceased, or the levy of an execution for a debt due him.(2)

4. It has been held, in construction of former and similar statutes upon this subject, that the Court of Probate has no authority to appoint commissioners to make partition, pending a petition for partition, instituted by some of the heirs, and an action by the widow for her dower.(3) (This principle is now substantially *enacted*.)

5. Also, that the reversion of the widow's dower cannot be assigned exclusively to one heir. Chiefly upon the grounds, that the statute authorized such assignment only of the estate *belonging to the intestate*; whereas the reversion of the dower is an estate *created by the distribution itself*; and that the act provides for a division of the widow's dower *at the expiration of the term*.(4)(a)

6. It seems, a judge of probate cannot order partition among devisees of a remainder. Of a contingent remainder he certainly cannot order partition. The statute contemplates, that *the whole estate* in the land which is the subject of partition be divided; and that all parties in interest be notified of, and bound by, the proceedings, and pay their shares of the expenses. But in case of such remainder, the whole cannot be divided, for a part, perhaps, has not vested in any sense; or, if it is divided among those who are interested and now living, there will be nothing left for future born children. So in a case where a division is impracticable, and money to be paid, there would be no party who could rightfully receive it. No process is provided for securing it to the future children, even if their proportions could be ascertained. But it is conclusive upon the point, that such proportions could not be ascertained, and the statute expressly prohibits partition in such cases.(5)(b)

7. In Maine, the same leading provisions are enacted as in Massachusetts. No *petition* is required; and where division is inconvenient, the whole may be assigned to *one or more*, preferring males to females, and older to younger heirs. No conveyance by an heir, &c., shall preclude the Probate Court from making partition.(c) A reversion or remainder expectant upon dower may be divided, either with the other estate, unless in case of dispute or uncertainty, or at the termination of

(1) Rev. St. 618, 624-7; St. 1838, 63.

(2) *Ib.* 430.

(3) *Stearns v. Stearns*, 16 Mass. 167.

(4) *Sumner v. Parker*, 7 Mass. 79.

(5) *Wainwright v. Dorr*, 13 Pick. 333.

(a) Whether, under the Revised Statutes, this decision is in force, *qu.?* A statute subsequent to the decision authorized partition of the reversion expectant upon dower.

(b) By St. 1853, 959, a guardian may be appointed to represent any person interested, who is not in being.

(c) The same provision was contained in a former act in Massachusetts; and it was construed to mean, not that partition should be made in part to an heir, &c., although he had conveyed his interest, but merely that such conveyance should not take away the court's jurisdiction, and that the grantee should stand in the place of such heir. *Pond v. Pond*, 13 Mass. 413; 17, 90.

In Maine, if there has been an execution sale of an heir's interest, partition shall enure to the vendee's benefit. Rev. St. 449. If such interest has been attached, any money, ordered to be paid to the heir, shall be paid to the officer. *Ib.*

the widow's estate. Where the estate is solvent, and has a claim against one of the heirs, this constitutes a lien upon his share, prior to an attachment for any other debt. The administrator is required to secure such claim by an attachment.(1)(a)

8. Partition is not effectual and binding, unless returned to, and accepted by, the court; nor is an heir *estopped* to claim his undivided share, by an acquiescence for eight years, and a conveyance of the part assigned him.(2)

9. In Rhode Island, partition is made upon the application of all parties interested. It is made *by lot* to the respective heirs, unless they agree upon the shares. The reversion of the widow's dower is assigned after her death, in the same manner as it would have been, had there been no dower.(3)

10. In Connecticut, partition is made by the Probate Court, unless the parties mutually agree upon a division, and present the same in writing, under hand and seal, to the court; which agreement, being acknowledged and recorded, shall be a valid settlement. The division is such, as to give male heirs their part in the real estate, so far as the estate will allow; but, if convenience so require, the females shall have part of the lands. (Where a division is impracticable, the same as in Maine, &c.)(b) The dower is divided at the end of the term, *if then remaining undivided*. *Devisees* stand on the same footing with heirs, where division is ordered by the will, and no one appointed to make it, or the party appointed fails to do so. Partition may be made where a joint tenant, &c., dies, having by devise limited a contingent remainder in the land.(4)

11. It has been held, that although a partition, by the parties themselves, is valid under the statute, they cannot legally appoint third persons to make it. Hence a promise by one heir to pay the other a certain sum, conformably to the decision of persons so appointed, is without consideration and void.

12. In construction of a former statute which authorized distribution of *all the estate*; one-third to the widow, and the residue to the children, &c.; it was held that the reversion of dower might be divided. Otherwise *all the estate* would not be divided. These words *in a will* would pass a reversion, and they should have the same effect in a statute. Moreover, the law is extremely solicitous to effect a complete settlement of estates as speedily as possible. And this construction is very strongly confirmed by the clause, (found also in the above act, sec. 10,) which authorizes a division when the dower expires, *if it re-*

(1) 1 Smith, 239-43; Me. Rev. St. 382, 449. See *Hobbs v Parker*, 31 Maine, 143.

(2) *Cogswell v. Reed*, 3 Fairf. 198.

(3) R. I. L. 224-7.

(4) Conn. St. 203-6; St. 1840, 27-8. See *Baxter v. Gay*, 14 Conn. 119.

(a) A writ of entry by an heir, to recover land of his ancestor, is not barred by the pendency of a petition, in the Probate Court, by an administrator, for a license to sell the same for payment of debts. *Chadbourn v. Rackliff*, 30 Maine, 354.

Partition between heirs and a third person, requires notice to the latter before the warrant issues. Neither notice to him from the commissioners to attend at the partition, and his actual attendance; nor occupation under the partition, unless so long continued as to give a title by disseizin, will be sufficient to make the proceeding valid. *Dean v. Hooper*, 31 Maine, 107.

(b) The above provisions seem exclusively applicable to *children*.

main undivided. This clause refers to a division by the court, not by the heirs themselves.(1)

13. In Vermont, partition may take place, though one heir has alienated his share. If a division is impracticable, the whole is assigned to one or more, (as above.) If the deceased held in common, partition is first made of his whole interest from that of his co-tenant. After dower or other life estate terminates, partition is made of the reversion.(2)

13 a. A decree of the Probate Court, partitioning real estate among heirs or devisees, is only conclusive as to the division among them of such estate as they have a right to have divided. It does not affect the title of the land. Hence, one devisee may subsequently set up in defence to an action by another for the portion assigned to the latter, that no such estate existed as was partitioned, but that the defendant had a paramount title to the whole land.(3)

14. In New Hampshire, the proceedings are very similar to those in Maine. The dower of the widow shall be divided, "when it shall have reverted;" or, upon request, with the other estate. Where a division is impracticable, the land may be assigned to the oldest male heir or devisee alone, or to any of the male heirs with him; upon their refusing to accept it, or if there are no males, to the oldest female heir, or any of the others, with her—preferring always the next of kin.(4)

15. In New Jersey, where any heir is a minor, the Orphans' Court, or surrogate, may, on application, order partition. So, where any devisee is a minor, or dies before division, leaving a minor heir. Allowance shall be made for damage done to the land by any one of the parties since the death of the intestate, &c. Provision is made, similar to those already mentioned, for the case where a division is impracticable. By a later act, the Orphans' Court may order partition among any joint tenants, &c., any of whom are minors; or, if a division will be prejudicial, a sale of the estate.(5)

16. The Orphans' Court has no authority to order partition between the heirs of a tenant in common, deceased, and his co-tenant.(6)

17. In Delaware, descended lands are subject to partition, unless it will be detrimental. Where there is a tenant by the curtesy, or in dower, partition of this part of the land is postponed till the termination of such estate, unless the tenant consent otherwise. If a sale takes place, the interests of these parties are saved. If the heirs are children or the issue of children, one share is assigned to each child or grandchild, &c. If children and the issue of children deceased, such issue represent the deceased parents, and the shares are made accordingly, with a subdivision of a share among such issue. And the same rule is adopted, where the heirs are brothers and sisters, or their representatives; making further subdivision, if necessary to give each party a *several* estate. And it matters not, whether the deceased child, &c., whose issue claim, died before or since the intestate. Any heir, or the widow, or a purchaser from either of them, may apply for partition. If the *freeholders*, (commissioners,) return that no partition can be made without injury,

(1) Webster v. Merriam, 9 Conn. 228; 8, 411; 6, 262; Munson v. Munson, 3 Day, 260.

(2) Verm. Rev. St. 294-7. See Grice v. Randall, 23 Verm. 239.

(3) Grice v. Randall, 23 Verm. 239.

(4) N. H. L. 342-4; Rev. St. 334.

(5) 1 N. J. L. 779-82; Ib. 1825-6, 395-6. See State v. Rickey, 3 Halst. 50; St. 1840, 31.

(6) State v. Parker, 4 Halst. 242.

the appraised value shall be distributed instead; and the whole estate assigned to one, preferring males to females, and older to younger heirs, and extending the same preference to the issue of those deceased. A similar rule is adopted, where a partition *into, the requisite number of* shares is impracticable. But a party, having chosen one part, shall not choose another, except under another right, until all the rest have been allowed to choose. The same principles are extended to the case of any *subdivision*, which is wholly or partially impracticable. The assignee of any heir has the right of the latter to make a choice; also the husband of a female heir. If no one will accept the estate, it shall be sold, and the proceeds paid or secured to the respective heirs. The party taking the whole land holds it discharged of all incumbrances created by the other heirs. A recognizance taken for the value of the estate is a paramount lien upon all present and future lands, &c. Partition shall be made only of such lands as were in possession of the intestate at his death, or have come to the heirs since. Provision is made for suspending proceedings in the case of *minority*. *Advancements* are to be taken into account.(1)(a)

18. In Maryland, if a division among heirs is impracticable, the property is allotted to the oldest, and, if he declines, to the next in age, and so on. If none will take it, it is sold; if all are minors, not till the oldest is twenty-one. The bond, given by him who takes the whole, is a lien on the land. Where an heir assigns his interest, the assignee may ask for partition. If the oldest male is an infant, the oldest female, of age, may elect. If the land is subject to curtesy, this shall be first set off. If indivisible, and there is no election, there shall be a sale, free from curtesy, and the tenant shall have a share of the proceeds. So one having any life estate.(2)(b)

19. In Pennsylvania, the Orphans' Court may make partition of descended lands, on petition of the widow or an heir. Where a decision is impracticable, the whole may be ordered to one heir, preferring males to females, and older to younger heirs, and extending the preference to children claiming by representation of their deceased parents. So the estate may be divided among only a part of the heirs. If none of them will accept the whole land, it may be sold, and the proceeds distributed. Where lands lie in different counties, an heir, who accepts the whole in

(1) Dela. L. 316-26; St. 1843, 489-91, | (2) Md. L. 750-7. See *Crouch v. Smith*, 1
Rev. Sts. | Md. Ch. 401.

(a) By assignment in the Orphans' Court, all liens created by an heir at law are removed, and his interest is changed into personalty, and secured by the recognizance. *The State v. Huxley*, 4 Harring. 343.

(b) When proceedings to divide real estate, situate in two counties, are commenced in Chancery, by bill or petition, the proceedings must, in all respects, be in conformity to the act of 1820, c. 191; and the commission must prescribe the same duties, give to the commissioners the same powers, and require of them the same return; and the rights of the heirs must be the same; as when the application is made to the county court. *Bennett v. Bennett*, 5 Gill, 463.

Upon a bill filed by husband and wife, against the co-heirs of the wife, to procure the division or sale of their father's real estate, of which he died seized and intestate, the fact that one of the defendants had purchased the wife's interest from her husband, and also the interest of the other heirs, no conveyance having been procured from the wife, in the mode prescribed by law, to pass the real estate of a *feme covert*, will not prevent the county court from issuing a commission, and directing and allowing an election to be made, according to the act regulating descents. *Chaney v. Tipton*, 3 Gill, 327.

one, shall be postponed, as to his right of election in the other county, to all the other heirs. Where there are life estates, with remainders over, the remainder-men shall be made parties, and shall have the right of taking the premises at the valuation, like lineal descendants, giving security to pay the interest to the tenants for life. If an heir, entitled to a sum of money for her share of the estate, is a married woman, the court may require security from the husband, that after his death it shall go to the wife or her heirs, as real estate would; and, on his failing to give security, may vest it in trustees, reserving the interest to him for life, unless he request otherwise. But such proceeding is dispensed with, where the wife, by a private acknowledgment, (as in case of deeds,) expresses her willingness that the money be paid to the husband, without security. The court may distribute the money paid, in case of a sale of the land, or assignment to a part of the heirs, among parties holding liens or incumbrances upon the land. A recognizance, given for the value of any share, shall be discharged, wholly or in part, on the record, under a penalty; or the court may order a discharge, which shall be recorded.(1)

20. It seems, partition cannot be decreed of lands in the adverse possession of a stranger, nor where one heir claims to hold in severalty a part of the land, though he consent to the proceedings, if before confirmation of them he objects.(2)

21. The Orphans' Court may order partition, though a petition at common law is pending, brought by another heir.(3)

22. Where an infant heir, or his guardian, has accepted the sum at which his share was valued, the former, after coming of age, may still avoid the decree for error, if he proceeds to do it as soon as the error is discovered.(4)

23. After the land is awarded upon regular proceedings to one heir, the court can pass no order to vary the amount of his liability therefor.(5)

24. Where, in settling the amount of the recognizance, given by one heir, who takes the whole land, no adjudication has been had upon an *advancement* made to another of the heirs; in a suit upon such recognizance for his benefit, the defendant may claim an allowance upon this ground.(6)

25. Joinder of the widow and heirs, as defendants in a suit for partition, is a fatal defect.(7)(a)

(1) Parke & John. 396-401. See Ragan's, &c., 7 Watts, 438; Sampson, 4 Watts & S. 86; Seaton v. Barry, 1b. 183; St. 1844, 214; Ebbs v. Com., 11 Penns. 374; Quigley v. Com. 16, 353.

(2) Galbraith v. Green, 13 S. & R. 93; Bell. 6 Barr, 457.

(3) Rex v. Rex, 3 S. & R. 533.

(4) Elliot v. Elliot, 5 Binn. 1.

(5) Gallagher v. Gallagher, 6 Watts, 473.

(6) Blanchard v. Com. 6 Watts, 309.

(7) Power v. Power, 7 Watts, 205.

(a) The following recent cases upon this subject have occurred in Pennsylvania. A decree of partition in the Orphans' Court is necessarily as conclusive as a judgment of partition by a court of law. Herr v. Herr, 5 Barr, 428. And an irregular partition cannot be avoided collaterally. Snevily v. Wagner, 8 Barr, 396. See Goundie v. Northampton, &c., 7 Barr, 233.

Suit on a recognizance in the Orphans' Court, given by an heir, who took one of three purparts at the appraisement in favor of the Commonwealth, for the payment to the other heirs of their proportional shares in the purpart; held, the defendant, under the plea of payment with leave, &c., might show that one of the other purparts, not taken at the appraise-

26. In Virginia and Kentucky, where one of several heirs is an infant, *feme covert*, *non compos*, or beyond sea, if the share of each heir does not exceed \$300 in Virginia, in Kentucky, £30, the Chancery, County or Corporation Court, (in Kentucky, the Chancery Court,) may order a sale, and distribution of the proceeds. (a) No parcener shall have any preference in an election or division. In Georgia, the courts of ordinary may, on application, make distribution of intestate estates, through freeholders, by lot or otherwise, giving a share to each distributee. They may also order a sale of lands, or slaves, if beneficial

ment, was sold by a trustee under order of the Orphans' Court; that the balance of the proceeds, after payment of the debts of the intestate, was paid to the plaintiff, and that the defendant in the suit never made any objection; and the fact, whether or not it was received as part payment, should be submitted to the jury. *Kidd v. The Commonwealth*, 4 Harris, 426.

Such recognizance should be sued in the name of the Commonwealth, though the name of the persons suing should be stated on the record. A mistake, however, in this respect, will furnish no defence, as the court will look to the distribution of the amount recovered. The judgment should not be for the penalty, but for the amount of the interest of those suing. *Ib.*

All the *cestuis que use* need not be marked of record. Less than the whole number may sue, and they may recover as much of the fund as they show themselves entitled to, leaving the balance for those entitled who may afterwards sue. But where they represent one heir, their joinder in the suit would seem to be proper. *Ib.*

In partition, under the act of 1832, the inquest may divide the land into more purparts than there are heirs; and such of the purparts as are not accepted may be sold. *Darrah's Appeal*, 10 Barr, 210.

In 1827, a husband could agree to a parol partition of real estate, in which his wife was interested as heir; and, where the interest of the wife was turned into money by way of owelty, such sum of money could be reduced into possession of the husband. *Darlington's &c.*, 1 Harris, 430.

The Statute of April 21, 1846, does not render a party, who, having previously purchased real estate sold under proceedings for partition in the District Court of Philadelphia, refused to accept a deed or pay the purchase-money, liable to pay the difference in the price brought at a subsequent sale. *McMichael v. Skilton*, 1 Harris, 215.

The District Court, before the Statute of 1846, had no jurisdiction of an action of partition between parties taking by descent from one who died sole seized. *Ib.*

In proceedings for partition, which result in the division of the land among a part of the heirs, who recognize to pay the shares of the other, such recognizances are not void, merely because the proceedings were erroneous. *Commonwealth v. Hufey*, 6 Barr, 348.

The Orphans' Court has no jurisdiction to decree partition among heirs, where one claims to hold a part of the land in severalty, though he consents to the proceedings; if, before confirmation of them, he objects to the partition. *Eell's Estate*, 6 Barr, 457.

An owelty, awarded on partition to one of several heirs, is a lien on the land, and takes precedence of subsequent liens of creditors of another of the heirs, claiming part of the land in his own right, and part by purchase from others of the heirs. *Darlington, &c.*, 1 Harris, 430.

Presumption of payment of an owelty, from lapse of time, may be rebutted, by proof of a payment on account, within twenty years. *Ib.*

Though a sheriff's sale for the debt of the ancestor discharges lands, held by an heir under proceedings in partition, from the lien of recognizances given to secure the other heirs their shares of the valuation, yet the debt thereby secured is not wholly discharged, if the amount due on the recognizance was more than sufficient to pay the debts of the ancestor for which the land was liable; and, in such case, the accepting heir is not entitled to participate in the surplus arising from the sheriff's sale, which is insufficient to pay the amount secured by the recognizance. *Commonwealth v. McIntyre*, 8 Barr, 295.

(a) On a proceeding for partition among heirs, it is not necessary that persons not heirs, in possession under some of them, should be made parties. *Pleak v. Chambers*, 7 B. Mon. 565.

In Kentucky, an application by heirs of an estate, for its partition, should set forth the names of the heirs. An order for partition, which directed the commissioners to convey to the heirs, was also held to be bad: the proceedings of the commissioners should first be reported to the court. *Rice v. Rice*, 10 B. Mon. 420.

In Mississippi, a part of several devisees, in remainder, after the termination of the particular estate, may apply to the Probate Court, to have their share set off to them, though others of them, claiming under the same will, claim the whole property. *Rail v. Dotson*, 14 S. & M. 176.

to heirs and creditors. An administrator may, if expedient, keep the estate together, and manage it himself, or let it out. In Mississippi, where a division is impracticable, the lands may be sold. The Probate Court may order partition, where one heir or devisee is a minor.(1)

27. In Michigan, where a division is impracticable, the whole estate may be settled on one or a part of the heirs, with the usual preference as to age and sex. If a husband is under guardianship, the wife may join his guardian in making partition of her land. Where partition would be injurious, the land will be sold, after an appraisal, as in case of an execution.(2)

28. In Kentucky, the County Court, on application, may make partition among heirs, including the reversion of the dower estate after its determination; and subject to the control and revision of a court of equity.(3)(a)

(1) 1 Vir. Rev. C. 358; 1 Ky. Rev. L. 565, 566; Prince, 241, 243, 249, 254; Missi. 112. (2) Mich. L. 65, 66; St. 1839, 220; 1842, 565, 566; Prince, 241, 243, 249, 254; Missi. 112. (3) 2 Ky. Rev. L. 1070, 1071. (See 3 Gratt. 348. Litt. 40.)

(a) In South Carolina, where one joint tenant or tenant in common dies, the ordinary has jurisdiction, under the acts of 1824 and 1839, to order his interest in the land to be sold, and the proceeds to be divided among his heirs or devisees. *Gates v. Irick*, 2 Rich. 593, note.

A decree of the ordinary, ordering a sale of land for partition, will not be disturbed on appeal, on the ground that the summons in partition was served on the defendant by the applicant himself, instead of by the sheriff. *Upson v. Horn*, 3 Strobb. 108.

Where an intestate died in 1799, and, in 1811, an informal division of his slaves was made between his widow and six children, it was held, on a bill filed for partition, after 1841, that it would be presumed that a legal partition had been made. *Walker v. Frazier*, 2 Rich. Eq. 99.

Where dower has been assigned to a widow, by giving her one-third of the net profits of an estate, this is no impediment to a partition or sale for partition by the heirs. *Hassell v. Mizell*, 6 Ired. Eq. 392.

Where land is sold by order of the Orphans' Court, to make equal distribution, and security is not required for the purchase-money, the heirs have an equitable lien upon the land for the purchase-money, which may be enforced either against the original purchaser, or a purchaser from him with notice; and, where the administratrix was the purchaser, the heirs might enforce their lien against such second purchaser, without resorting in the first instance to the sureties of the administratrix on her official bond, she having paid no part of the purchase-money, and being insolvent. *Strange v. Keenan*, 8 Ala. 816.

The act of Tennessee, of 1787, c. 17, sec. 1, which provides that the return of the commissioners in a partition suit shall be made under their seals, is merely directory, and does not vitiate the record of partition where the direction has not been complied with, the return having been received and made part of the record of the court. *Bledsoe v. Wiley*, 7 Humph. 507.

Where under a devise of real estate in remainder, three of the devisees had expended a large sum in valuable improvements, in good faith, believing that they were the sole owners, they were allowed, in partition, for the enhanced value of the estate in consequence of such improvements. *Conklin v. Conklin*, 3 Sandf. Ch. 64.

Commissioners made partition between heirs, and assigned dower to the widow, but by mistake omitted to mention in the partition the parcel set off as dower, and which was intended to be assigned to one infant heir, according to an agreement with the adult heirs and the guardians of the minors, so that the infant received a much smaller portion of the estate than the others. The report was confirmed, and judgment entered thereon, and the error was not discovered till 30 years afterwards the widow having lived during the intervening time. Held, the agreement between the parties was invalid; that the occupation by the parties of the lands set off to them was no ratification of such agreement; but that, as the partition showed on its face that a part of the land was not set off at all, a court of equity could grant relief, on the ground of accident, and give effect to the intended partition, according to the original design of the commissioners and the justice of the case. *Douglas v. Viele*, 3 Sandf. Ch. 439.

CHAPTER LXXIX.

TITLE BY PUBLIC GRANT, PATENT, SURVEY, ETC.

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|---|---------------------------------|
| 1. United States grants, &c. | 184. Maryland. |
| 34. Grants, &c., in the several States— | 190. Virginia. |
| Massachusetts. | 220. North Carolina. |
| 42. Maine. | 237. South Carolina. |
| 49. New Hampshire. | 248. Georgia. |
| 55. Rhode Island. | 249. Alabama. |
| 56. Vermont. | 250. Tennessee. |
| 65. New York. | 272. Kentucky. |
| 88. Pennsylvania. | 286. Ohio. |
| 183. New Jersey—Delaware. | 290. Missouri and other States. |

NEXT in importance to the title by descent, is that by *conveyance* or *purchase*; including *public grants* and *the deeds of private individuals*. First in order, under this general division, is the title by *grant*, *patent*, *warrant* and *survey*, &c., derived directly from the government of the United States^(a) or a State. In some parts of the country this is a very important branch of the law; and there is a proportional number of minute statutory provisions, and of judicial decisions, pertaining to it. Of these, it will be impossible, within the limits of the present work, to give more than a brief and perhaps imperfect abstract. We begin with the laws regulating the sales of the United States domain; and shall proceed to give a view of those of the several States, in which the subject is of practical importance.

1. The public domain of the United States is said to consist of the following lands. The territory gained by the treaty of 1783 with Great Britain; a triangular tract on Lake Erie, granted by New York in 1780, (and since purchased by Pennsylvania,) for the use of such States as should be parties to the confederation; land formerly within the Virginia charter, north-west of the Ohio river, conveyed in 1786, to be, after certain reservations, a common fund for the States; cessions from Massachusetts in 1785, from Connecticut in 1786 and 1800, from South Carolina in 1787, from North Carolina in 1790, from Georgia in 1802; the lands ceded by the Indians; Louisiana, Florida, and the District of Columbia, granted by Virginia and Maryland.

2. Where one occupies, or causes to be occupied, United States land not sold or leased, or his claim to which is not confirmed; or surveys it, or marks the boundaries, &c.; he forfeits his right *ipso facto*.⁽¹⁾

(1) Gord. 319.

(a) Public lands are sometimes acquired by treaty; and where a treaty says, that the title to land is thereby vested in a certain individual, his heirs and assigns, the treaty operates as a grant: but, when it says that a half-section of land, at a specified point, shall be granted to a certain person, &c., by patent from the President of the United States, it amounts only to a contract for land to be afterwards located and conveyed. *Longlois v. Coffin*, 1 Smith, 378.

The word *grant*, in a treaty, applies to any concession, warrant, order or permission to survey, possess or settle, whether written, parol, or presumed from possession. So a grant may be made or confirmed by a *law*. *Strother v. Lucas*, 12 Pet. 410. But no officer of the government can reserve or appropriate the public domain. *McConnell v. Wilcox*, 1 Scam. 344.

3. Lands north-west of the Ohio river, and above the mouth of the Kentucky river, are divided by lines running north and south, and other lines crossing these at right angles, forming townships six miles square; unless such demarcation is prevented by the interference of the line of the (then) late Indian purchase, or land before surveyed or patented, or the course of navigable rivers.(a) The corners of a township are marked with progressive numbers, as also each interval of one mile. One-half of the townships, alternately, are divided into sections, of 640 acres, or as near that as may be, by running through them, each way, parallel lines at the end of every two miles. The fractional parts of townships are also divided into sections, and the fractions of sections annexed to the adjoining section. The surveyor makes a note of mines, salt licks, salt springs, mill-seats and water-courses.

4. Townships west of the river Muskingum, which are to be sold in quarter townships, are divided into half-sections of 320 acres, or nearly that number. The interior lines of townships intersected by this river, and of all townships east of it, not heretofore (1800) divided into sections, shall be run and marked like those of townships directed to be sold in sections of 640 acres.(1)

5. Lands north of the Ohio river, which were divided by running parallel lines through the townships every two miles, and marking a corner every mile, are divided into sections by running lines from the mile corners to the opposite corresponding corners, and marking intermediate corners on each of such lines, equidistant, or nearly so, from the corners of sections.

6. All public lands are sold, if at auction, in half-quarter sections; if otherwise, in sections, half sections, quarter sections, or half-quarter sections, (or quarter-quarter sections.) A quarter-quarter section is divided by a line running east and west. Fractional sections, containing fewer or more than 160 acres, shall, as nearly as possible, be divided into quarter-quarter sections.

7. In case of the division of a quarter section, the line runs north and south. These provisions, however, are subject to other acts in relation to sales in town lots. And the President, in some instances, has authority to order a departure from the usual mode of survey. No one shall enter more than one half-quarter section in quarter quarter sections, nor unless he intends it for improvement.(2)

8. The cultivator and inhabitant (or his representatives) of land in Illinois, and that part of Louisiana formerly composing Orleans, and Missouri, not belonging to and claimed by another, has a preference, or right of *pre-emption*, to the extent of a quarter section of land.(b) The act does not apply to lands heretofore reserved, or those to be sold in town lots and out lots.(3) Such claimant notifies the Register of the District Land Office, and enters the land with him, upon paying one-twentieth of the price to the receiver. The entry must be made at

(1) Gord. 343, 344. See *McConnell v. Wilcox*, 1 Scam. 344.

(2) Gord. 345.

(3) *Ib.* 346, 347.

(a) If a navigable stream intervenes, in running the lines of a section, the surveyor does not cross it. *Lemen v. Smith*, 7 Por. 428.

(b) The surveyor is bound to survey entries according to their priority, either in a square or oblong shape. *Mitchell v. Thompson*, 1 M.L. 99.

least two weeks before a public sale. Any settler (entitled to the above preference) upon the fraction of a section or a fractional quarter section, containing less than 160 acres, may purchase the adjoining fractional quarter sections, or the adjoining quarter section, including improvements, or the fraction improved by him, at his option.(1) If there are several settlers entitled to pre-emption, on a quarter section or a fractional quarter section, each may have the right of purchasing one or more quarter sections or fractional quarter sections of the land settled on; which shall be equitably divided in such way as to give every one his own improvements. By a subsequent act, the same provision is substantially repeated, except that no preference is allowed for more than one quarter section, in addition to a party's portion of the fractional quarter section settled on.(2)

9. Where a person, being of age or the head of a family, and an inhabitant, (or his representatives,) on or before January 1, 1825, cultivated land in Florida, not belonging to another, the same provision is made as that above mentioned, in reference to Illinois. But this does not apply to any claim by confirmation of commissioners or act of Congress.(3)

10. Where a person has his name upon the list of settlers, reported to the commissioner of the land office by the register and receiver for the District of Jackson Court-house, in Mississippi, and has no written proof of title, and on March 3, 1819, cultivated land not claimed by any written title, under the British, French, or Spanish government, or granted by Congress as a donation; he shall have the right of pre-emption; the quantity not to exceed 160 acres, and to be located by sectional lines, and entered within two years, if offered at public sale.(4)

11. Any settler or occupant in possession, May 29, 1830, who cultivated in 1829, may enter, by the legal subdivisions, any number of acres, not exceeding 160 or a quarter section, including improvements, for the minimum price. This provision does not apply to lands reserved for the United States, or any State. Where two or more persons are settled upon one quarter section, if, by a north and south or an east and west line, the settlement or improvement of each can be included in a half-quarter section, it may be divided between the two first actual settlers; and, in such case, said settlers shall have a pre-emption right to eighty acres elsewhere in the district, not interfering with the prior right of others. Proof must first be furnished of an improvement or settlement; and the pre-emption right cannot be transferred, until a patent has issued. These provisions are not to delay the sales of land pursuant to the President's proclamation; nor to be taken advantage of, unless the requisite proof and payment be made before the day of public sales; nor to apply to any land reserved from sale by authority, or in any way appropriated.(a) A subsequent act of 1832 provides, that purchasers under the act of 1830 may transfer their certificates or final receipts, and an assignee may take out a patent

(1) Ib. 347, 348.

(2) Gord. 348.

(3) Ib.

(4) Gord. 349.

(a) It is said, the act of May 29, 1830, containing the above provisions, was limited to one year, but has been continued to 1836. Gord. 350, n.

in his own name. Also other acts of 1832 and 1833, that where, in consequence of delay in the public surveys, or because the land was not attached to any district, or because there was a disputed public boundary, a settler could not prove and enter his claim within the time above prescribed; one year shall be allowed after the removal of such difficulty; and, if the land is proclaimed for sale within a year, it shall be entered before a sale. The occupants upon *fractions* may enter them as above, but if exceeding one quarter section, one hundred and sixty acres, to include the improvement. A person occupying one quarter section and cultivating another, may enter either, designating within six months, (from June 19, 1834,) which he claims.(1)

12. Sections 2, 5, 20, 23, 30, 33, may be sold in one-quarter or half-quarter sections; a quarter section to be divided by a line running north and south.(2) Provision is made for the form of the memorandum to be filed by a proposed purchaser, and for the correction of any accidental error therein, as to the particular land referred to, or in a patent actually issued.(3)

13. Every person is prohibited from making a bargain with another to prevent the latter from bidding for public lands at auction. Any previous contract, to purchase from a purchaser at auction for an advance, is void; and the advance paid may be recovered back.(4)

14. By Statute of March, 1821, any purchaser, prior to July 1, 1820, may relinquish a portion of his land, within a certain time, and thereby have any payment upon the part relinquished applied to the amount due upon the part retained. If two or more quarter sections were bought at once, he shall not relinquish less than one.(5) Where a purchaser neglects to pay the amount due for three months from the day appointed, the land is forfeited, but any sum paid may be applied on other accounts, by the issuing of a certificate.(6) Where a sale proves invalid for defect of title, the United States shall refund the price.(7)

15. Where two or more purchasers agree upon a division, new certificates may be issued accordingly, upon surrender of the old one; but not for less than eighty acres, nor by a division other than north and south, or east and west.(8)

16. Where a patentee of public lands dies before the date of the patent, his heirs, devisees or assignees may take.(9) (But see s. 21.)(a)

(1) Gord. 349, 350, 351, 352.

(2) Ib. 353.

(3) Gord. 352-3-4.

(4) Ib. 355-6.

(5) Ib. 357-8.

(6) Ib. 359-62-5.

(7) Ib. 361.

(8) Ib. 363.

(9) Ib. 366. See *Jones v. Inge*, 5 Por. 327.

(a) It is held in Indiana, that where a land-office certificate is made in the name of the heirs of A, A's administrator has no power to assign it. *Hawkins v. Johnson*, 4 Blackf. 22. Where one dies, entitled to a certificate under the act of May, 1828, a certificate may issue to his heirs. *Shanks v. Lucas*, 4, 476. In Ohio, in case of a grant to revolutionary officers, or their legal representatives, where they are dead, the heirs will take as purchasers. *Thompson v. Gotham*, 9 Ohio, 170.

In Kentucky, (Sts. 1852, 45,) a patent executed or issued after the patentee's death, is good for his heirs.

It has been held in the United States Court, that a grant cannot take effect, where there is no grantee. Hence a patent, made after the patentee's death, passes no title. So an entry, in the name of one deceased, is a nullity. But an entry in the name of "A's heirs," not naming them, may be valid. *Galloway v. Finley*, 12 Pet. 264; *McDonald v. Smalley*, 6 Pet. 261; *Hunt v. Wickliffe*, 2, 208.

17. The following are some of the leading principles settled by the Supreme Court, in relation to grants and other appropriations of the public lands.

18. A grant may be good for a part of the land, and void for a part. Thus, where it includes land lying within, and land lying without, the territory retained by the Indians, it may be valid as to the latter, though void as to the former.(1)

19. A patent or grant cannot affect pre-existing titles.(2)(a)

(1) *Winn v. Patterson*, 9 Pet. 663; *Patterson v. Jenks*, 2, 235; *Danforth v. Wear*, 9 Wheat. 673. See *Marsh v. Brooks*, 8 How. 223.

(2) *New Orleans v. Armas*, 9 Pet. 236; (*U. S. v. Arredondo*, 6, 738.)

So, under the act of 21st May, 1836, patents issued to persons deceased, enure to their heirs. *Schedda v. Sawyer*, 4 McLean, 181.

Late acts of Congress have added to, and in some respects modified, the provision stated in the text, relating to the public domain of the United States. By act of 1841, (p. 25,) the States of Ohio, Illinois, Indiana, Alabama, Missouri, Mississippi, Louisiana, Arkansas and Michigan, as also any future new State, receive a donation of 500,000 acres for internal improvements; or enough to amount to this quantity, in addition to what they had before received. The minimum price of sale is fixed at \$1 25. By the same act, any head of a family, widow, or single man, over twenty-one, a citizen, or having declared according to law his intention to become one, who has made, since June, 1840, or shall hereafter make, a settlement on lands to which the Indian title is extinguished, and which have been surveyed, and shall inhabit and improve them, and build a dwelling thereupon, may enter one hundred and sixty acres, at the minimum price, subject, however, to many restrictions and qualifications.

By the same act, (p. 27,) if two or more settle on one one-quarter section, the pre-emption belongs to him who settled first.

By act of 1840, (p. 21,) where a settler lives on one one-quarter section, and cultivates another, he may elect to enter either, or sub-divisions of each, not exceeding a one-quarter section in all. If one person improved, and then leased to another, who was in possession June 22, 1834, and four months before; or if the two occupied during the four months; the latter has the pre-emption, though out of possession four months, or a part of that time. Every settler on lands, unsurveyed June 22, 1838, and who, since a survey, is found to have then lived, and four months previously, on a one-sixth section, set apart for schools, may enter at the minimum price any other one-quarter section in the same district, to which there is no other pre-emption right. A settler on land, before its selection by the State for a seminary, may enter at the minimum price another one-quarter in the district to which there is no prior right. The act of 1838 is continued in force till June 22, 1842.

An act of 1843, (p. 74,) makes certain exemplifications from the land-office legal evidence.

By act of 1844, (p. 135,) certificates issued by the U. S. Treasurer, in favor of depositors of money for lands bought under the act of April 24, 1820, and assigned, may be taken in payment for lands purchased.

By the same act, (p. 12,) in case of public land, occupied as a *town site*, if incorporated, the authorities, if not, the judges of the county, may enter at the minimum price in trust for the occupants; the execution of the trust to be directed by the legislature. The entry must be prior to a public sale of the tract including such land, and shall embrace only what is actually occupied by the town, not over three hundred and twenty acres, and must conform to the divisions of the act of April 24, 1820.

The same act, (p. 39,) provides for a change of lands in Florida, where there is danger of their being overflowed.

By act of 1845, (p. 36,) a condition of the admission of Iowa and Florida into the Union, is, that they shall not interfere with the primary disposal of the public lands, nor tax them while belonging to the United States.

For further provisions upon this subject, see 9 Sts. at Large, 9, 51, 519, 520, 633, 332, 472; Sts. 1851-2, 152; 1852-3, 3, 7, 14; 1853-4, 346, 574.

(a) But, in equity, a junior patent or certificate prevails over an older one, if the former is accompanied by priority of right. *Isaacs v. Steel*, 3 Scam. 99.

As stated in the text, the general doctrine is, that a grant or patent appropriates the land, and passes a legal title; and no facts behind the patent can be investigated, at law. Thus, a defect in the entry or survey. But in case of *fraud* actual and positive, law and equity have concurrent jurisdiction. And Chancery may inquire into the preliminary steps, where

20. Objections, which have no weight in support of a legal title, against an equity, dependent entirely upon a survey, for which no patent had been issued, can have no weight against a patent regularly and formally issued.(1)

21. A patent for unimproved lands, (wholly unoccupied,) gives legal seizin and constructive possession of all the land within the survey. So, if an entry be made under a grant, and there is no adverse possession, the entry will be limited only by the grant, unless the contrary appear.(2)

22. If the essential call of an entry be uncertain, as to the land covered by the warrant, and there are no other calls which control the special call, the entry is invalid. To constitute a valid entry, some leading objects called for must be known to the public at the time it was made, and the calls must be so certain as to enable the holder of a warrant to locate adjoining land, by using reasonable diligence.(a) Where the object is known by two names, so that it can be found by a call for either, such a call will support the entry. Certain calls may be explained or controlled by other calls. So the court will correct mistakes

(1) *Stringer v. Lessees, &c.*, 3 Pet. 340.

(2) *Peyton v. Stith*, 5 Pet. 485; *Miller v. McIntyre*, 6 Pet. 61.

an elder equitable right is set up. *Boardman v. Lessees, &c.*, 6 Pet. 323; *Stringer v. Lessee, &c.*, 3, 340; acc. *Balliot v. Bauman*, 5 W. & S. 120; *Ballance v. Tosson*, 12 Illin. 326; *The People v. Livingston*, 8 Barb. 253; — v. *Mauran*, 5 Denio, 389; *Sears v. Parker*, 1 Hayw. 135; *Tyrrell v. Mooney*, 1 Mur. 401; *Tate v. Greenlee*, 2 Hawk. 231; *Hough v. Dumas*, 4 Dev. & B. 328; *Muse v. Laughridge*, 2 Bay, 426. See *Faulkenberry v. Truesdell*, 5 Strobb. 221.

But a patent is said to be only evidence of title. *McConnell v. Wilcox*, 1 Scam. 357; *Goodlet v. Smithson*, 5 Por. 245; *James v. Betz*, 2 Binn. 12; *Wolf v. Goddard*, 9 Watts, 547. The court may go behind it, and inquire into equitable claims. *Brush v. Ware*, 15 Pet. 93. It overrides subsequent rights, not prior equities. *Ib.*

After the issue of a patent, assignments and transfers of the pre-emption right will not be inquired into. *Morgan v. Curtenius*, 4 McLean, 366.

So, a second patent is invalid, till the first has been revoked by *scire facias*, or bill or information in Chancery. So, though the second recites a mistake in issuing the first. *Jackson v. Lawton*, 10 John. 23. Otherwise, where fraud or mistake appears by the patent itself. But it cannot be shown collaterally, that the patentee intended was a different person and of a different name from the one mentioned; nor that the survey was prior to the warrant. *Jackson v. Hart*, 12 John. 77. See *Adams v. Jackson*, 4 W. & S. 55. See *Dickson v. Stanley*, 10 John. 133; *Lassly v. Fontaine*, 4 Hen. & M. 146; *McClean v. Tomlinson*, 5 Munf. 220.

It has been held, that a grant fraudulently obtained is void; and that a second grantee acquires the legal estate. *Boring v. Lemmon*, 5 Harr. & J. 223; *Garretson v. Cole*, 1, 370; *Hindman v. Reed*, 4 Har. & M'H. 6; *Crommelin v. Minter*, 9 Ala. 594; *White v. Jones*, 4 Call, 253. A fraudulent patent was cancelled, by tearing off the seal in open court. *Seward v. Hicks*, 2 Bland, 261.

So, in ejectment, a defendant may show that the plaintiff's patent was illegally obtained. *Hambleton v. Wells*, 4 Call, 213.

It is held, that even if the sovereign power could at pleasure revoke a grant, which has passed the great seal, a second grant is not evidence of revocation. *Duncan v. Beard*, 2 Nott & McC. 400.

A party who has obtained a grant of land under the act of the general assembly of Georgia, passed in 1845, cannot be affected by the fraudulent conduct of the state-house officers, unless he participated therein. *Lamb v. Harris*, 8 Geo. 546.

Although a patent fraudulently obtained, or which has issued in violation of law, is void, and does not authorize a recovery against a party in possession under color of title; a mere intruder cannot insist upon the invalidity of the patent: and, where the defendant offers no evidence to justify his possession, the fair inference is, that he is an intruder. *Crommelin v. Minter*, 9 Ala. 594.

(a) See *Brush v. Ware*, 15 Pet. 93.

in calls. The entire description must be taken, by a reasonable construction. If any call is so repugnant to the rest as to be clearly made by mistake, it will be rejected; but if the description is wholly uncertain, the grant is void. Boundaries, natural or artificial, control course and distance.(1)

23. A survey, which had not acquired notoriety, is not a good call for an entry. But when the survey has been made conformable to the entry, and the latter is valid, the call for the survey may support an entry. The boundaries of the survey must be shown.(2)

24. A junior entry limits the survey of a prior entry to its calls.(3)

25. Until the survey of an entry, a subsequent location must be governed by its calls. It is for this reason that the law requires precise description in an entry.(4)

26. A rectangular form shall be given to the survey, unless some object called for requires otherwise.(5)

27. In construing an entry, the intent of the locator is to be chiefly regarded.(6)

28. Chancery will sustain the rights of one claiming under an entry, which is *clearly proved*; but will not interfere where there is a *balance* of rights.(7)

29. An entry of land, in a county which is afterwards divided, does not, after the division, authorize a survey in the original county, if the land falls within the new county.(8)

30. Where an act provided, that no location should be made upon tracts, for which patents had previously issued, or which had been previously surveyed; it was held, that the act was not intended to apply to valid and regular surveys, but to protect surveys, which, though not void, were defective and voidable.(9)

31. A conveyance of land by a pre-emptor, before the issuance of a patent, is, by the laws of the United States, absolutely void.(10)

32. A pre-emption right, claimed under the act of Congress, 4th September, 1841, can be sustained only by showing some steps taken to secure the same.(11)(a)

33. In many States of the Union, which have long had few public lands to dispose of, there are few statutes or decisions upon the subject, which are now practically in force.

34. Massachusetts has owned large tracts of vacant lands in Maine, which, however, her present policy is, wholly to dispose of: and has an agent, whose duty it is to make surveys, and do other acts for ascertain-

(1) *Garnett v. Jenkins*, 8 Pet. 75. (See 5, 485;) *Boardman v. Lessees, &c.*, 6, 328; 3 320; *Barclay v. Howell*, 6, 498; *Croghan v. Nelson*, 3 How. 187.

(2) *Holmes v. Trout*, 7 Pet. 171.

(3) *Ib.*

(4) *Ib.*

(5) *Ib.*

(6) *Holmes v. Trout*, 7 Pet. 171. (But see 3 *Watts*, 465.)

(7) *Garnett v. Jenkins*, 8 Pet. 75.

(8) *Boardman v. Lessees, &c.*, 6 Pet. 328.

(9) *Jackson v. Clark*, 1 Pet. 636.

(10) *Glenn v. Thistle*, 23 Miss. 42.

(11) *United States v. Brown*, 4 McLean, 378.

(a) See further *Lytle v. Arkansas*, 9 How. 314; *Blanc v. Lafayette*, 11 How. 104; *Gilmer v. Poindexter*, 10 How. 257; *Surgett v. Lapice*, 8 How. 48; *Menard v. Massey*, *Ib.* 293; *Bissell v. Penrose*, *Ib.* 317; *Mills v. Stoddard*, *Ib.* 345; *Campbell v. Township, &c.*, 12, 244; *U. S. v. Moore*, 12, 209; — *v. Porche*, *Ib.* 426; *Campbell v. Township, &c.*, *Ib.* 244; *U. S. v. Boyd*, 5 How. 29; *State v. Miller*, 3 McL. 151; *Doe v. McMillan*, 3 McL. 20; *Nelson v. Moon*, *Ib.* 319; *Astrom v. Hammond*, *Ib.* 107; *Palmer v. Cuyahoga, &c.*, *Ib.* 226, *State v. Miller*, *Ib.* 151.

ing the value of such lands, and preserving the timber thereupon, and, under the direction of the legislature, to sell the lands or timber.(1)(a)

35. The General Court of Massachusetts, in 1716, appointed commissioners to receive and record the claims of the people to lands, throughout the whole of what is now Maine. The Indian deeds were produced, with other claims, and gained a standing as legal titles. But the government, alarmed at their extensiveness, in 1731, prohibited all purchases from the natives, without license from the legislature.(2)

36. It has been held in this State, that where one is in possession of public lands, a resolve of the legislature, releasing them to him, passes a title, without any further act, except performance of the conditions, if any.(3)

37. So, a grant by the provincial legislature, though depending upon the approval of the crown, which was never given, but confirmed by resolves after the revolution, has been held to pass a title and seizin, from its date.(4)

38. Towns, or proprietors of common lands, may transfer their lands *by vote*, irrevocably.(b) (See sec. 43.) In construing such grants, the most liberal and benignant rules have been adopted, to fulfil the intention, which in early times was not always very plainly expressed. But where there is no express grant of the land, but only a vote that it shall be "left common for the use of the town for building stones," a grant of the land cannot be implied. It seems, a distinct record of a grant by vote cannot be controlled by parol evidence. But if the book leaves it doubtful, whether the entry is the act of the proprietors, or of their clerk or other officer; parol evidence is admissible to show by whom and for what purpose the entry was made.(5)

39. In ancient grants of towns, when a fee was intended, words of inheritance are seldom used. When a long possession by the grantee,

(1) Mass. Rev. St. 92. See Thompson v. Bright, 1 Cush. 420; St. 1853, 998.

(2) Sulli. on L. T. 45.

(3) Mayo v. Libby, 12 Mass. 339.

(4) Prop'rs. &c. v. Jones, 12 Mass. 334. (But see Hill v. Dyer, 3 Greenl. 441.)

(5) Springfield v. Miller, 12 Mass. 415; Codman v. Winslow, 10, 146: 1 Pick. 224; Worcester v. Green, 2 Pick. 428; Williams v. Ingell, 21 Pick. 288. See Allen v. Parish, 3 Ohio, 107.

(a) By St. 1850, 998, commissioners are authorized to settle all controversies growing out of sales of the public lands or their products. The agent cannot sell the lands without written approval of the commissioners, but may sell the timber for a specified period. The agent shall fix, and hold as private, a minimum price, and advertise for sealed proposals. The highest bidder, offering not less than this price, and giving security, shall be the purchaser.

By St. 1851, 672-3, it is made the duty of the land agent to superintend the public lands in Maine; and make and execute contracts for the sale of timber and grass, with the approval of the commissioners of public lands. But the fee in the soil shall not be disposed of. In contracts for the sale of timber, the time for removal shall be specified, and, in all cases, the price shall be paid or secured before delivery of the contract. Purchase-moneys shall be paid over to the treasurer; and all securities made payable to him. The secretary, treasurer and auditor are appointed commissioners.

By St. 1853, 991-2, the land agent, with concurrence of the commissioners, may sell all unsold lands and timber. If the sale is on credit, the security to be satisfactory, independent of any lien. Before selling the land, except to the State of Maine, the agent shall offer it to prior purchasers of timber, on reasonable terms, and for a time not exceeding three months. Public notice shall be given, that the lands are for sale. Not more than two townships shall be sold to one purchaser before February 1, 1854, except to the State of Maine, or a purchaser of the timber. Maine has the first refusal of the lands. After February 1, 1854, all the timber and lands may be sold to one or more purchasers.

(b) See Mass. Rev. St. 356; St. 1837, p. 31.

his heirs or assigns, has followed, the original grant has uniformly been considered as the grant of a fee.⁽¹⁾

40. In the old towns, under the Colony government, the affairs of the towns and of the *commoners* in towns were not kept distinct. Hence a proprietary grant, voted by the town, and attested by a proprietary clerk, has often been admitted in evidence; and also very ancient grants of proprietors' lands, voted by them or the town, attested by town clerks.^{(2)(a)}

41. In Maine, it is provided that where, in the grant of any township, or parts thereof, lots are reserved for the use of the township, and for public uses, which lots are not located by the grantees, by the time the township is incorporated, the assessors of the town may procure such location by application to a court. The committee, appointed to make the location, shall select lots of an average quality; and their return, being recorded, shall be an assignment of the lots to the proposed uses. So, the court may confirm locations made by proprietors themselves. It is further provided, that the lien of the State upon lands sold, may be expressed in the deed itself. The surveyor-general, or his assistants, shall not purchase public lands, or the timber on them, under penalty of paying not less than \$20,000, and removal from office. No township or tract, not already (1835) surveyed, shall be sold, till all the land is surveyed and lotted; farming land into lots not exceeding 170 acres; other land, 700 acres. Lands shall be sold only to those who will do *settling duty*; viz., clear 15 acres, lay to grass 10 acres, and erect a house in four years; or, if the purchase is of more than one lot, clear 10 acres and lay to grass the same proportion on each lot, and build a house upon one lot. No person shall buy more than four lots in one township or tract. All land, except settling land, shall be first offered at auction at the fixed price. In case of forfeiture for breach of condition, redemption is allowed within two years from the act, (March 23, 1838,) unless the State has re-granted the land, or a suit is pending as to the title, to which the State is no party. The act applies to forfeitures incurred within one year from its passage. Where twenty or fewer persons select each a lot of 170 acres, in a township without a mill, and give bonds to erect a saw and grist-mill within three years; deeds shall be given them for no other consideration, conditioned to perform settling duties. By late acts, the land agent may sell the public lands, except those lotted for settlement, at public or private sale, not exceeding three townships a year, at least one quarter of the price to be paid, and notes given for the balance. A lien shall be reserved on the land and timber. For the third class timber the minimum price is \$2 per 1,000 feet. If the agent doubts the purchaser's intention to cut, he may require payment in advance for stumpage, not exceeding \$2,000 per township, which will be forfeited, unless he acts as agreed. It is further provided, that the act of 1843 shall not interfere with sales under that of 1842; also, that the act of 1842, so far as requiring a survey into lots not exceeding 700 acres, be repealed. A permit to cut

(1) *Stoughton v. Baker*, 4 Mass. 528.

| (2) 2 Dane, 695.

(a) Record as follows: "August 13th, 1742. At the request of S. W. is granted to the right of W. P., half an acre." Held, S. W. could not claim under such grant, without proof that he derived title under W. P. 21 Pick. 288.

pine timber is not transferable, except as security for supplies furnished on the land. Timber remains the property of the State, till payment of stumpage. Licenses to cut grass, timber, &c., are limited to one year. The agent may make sale of the timber or grass for a period not exceeding three years. One thousand acres, upon an average, are reserved for a township, to be selected in three months. No land, not already surveyed, at the date of the Revised Statutes, to be sold, till all in the township or tract is surveyed and lotted. Farming land to include not over 170, other land not over 700, acres. The agent to give deeds, but only to those who will do settling duties. He may sell, as settling land, lots not surveyed as such, but more suitable for settlement than for timber. Large lots, equal to four settling lots, to be subject to settling duties. The purchaser must clear 15 acres, 10 of which must be laid to grass, and build a house in four years. If more than one lot is sold, 10 acres shall be cleared, grass raised in the same proportion, and a house built on one of them. One person shall take not over four lots in the same town or tract. Only five townships, except settling land, shall be sold in one year.(1)

42. The usual reservation, in a grant by the State, of a portion of lands for public uses, is a condition subsequent, binding on the grantees. A vote of the proprietors, to set apart a designated portion of the lands for such uses, vests the fee in the parties beneficially interested, if in being, and capable of taking: if not, the fee remains in the original grantees, and their heirs, not in the State, nor in the town, as successor to the corporation of proprietors.(2)(a)

(1) 1 Smith, 171-2; Me. L. 1832, 32; Deane, Ib. 216; Stearns v. Godfrey, 4, 158; 1835. 296-8; 1838, 509-10-11; 1844, 131-2; 1843, 69-71; Rev. St. 49-52. See Holbrook v. Holbrook, 3 Shepl. 9; Hovey v. Machias v. Whitney, Ib. 343.

(2) Porter v. Griswold, 6 Greenl. 430.

(a) The State of Massachusetts, having granted lands, with a reservation of lots for the purposes of education and worship; held, after the separation, the State of Maine had sufficient possession, until schools, &c., were established, to maintain trespass against intruders. State v. Cutler, 4 Shepl. 349.

Where lands are granted by a State, upon a condition to be subsequently performed within a limited time, the title will remain valid, until the State, by some legislative act, shall avail itself of a forfeiture. Little v. Watson, 32 Maine, 214.

Where such a grant was made by Massachusetts, prior to its separation from Maine, of land in Maine, the legislature of Massachusetts may extend the time allowed for performing such condition, notwithstanding the separation. Ib.

Where, in a grant by the State of Maine, of a township of land, there are reserved one thousand acres for public uses, the fee in such reserved land does not vest in the grantees of the township, even if no town or plantation should be established there. Dillingham v. Smith, 30 Maine, 370.

A location of land, reserved for public uses in the grant of a township, made by the county commissioners, and accepted by the District Court, after notice to persons interested, conclusively determines the extent of the reservation, although the location does not in fact include one thousand acres, and although it is taken in parts of two lots, instead of being wholly in one. Ib.

The committee appointed to locate lands, reserved for public uses out of lands granted by the State of Maine, since the Statute of 1823, need not specify the uses for which the reservations were made. Farrar v. Loring, 26 Maine, 202.

It is not sufficient cause to grant a *certiorari*, on the petition of the owners of a township, that the lots located for public uses contain less land than is reserved by the grant. Ib.

On a petition for a *certiorari*, in such case, the question, whether the land located by the committee is better than the average, cannot be inquired of. Ib.

No notice to the owners of a township, of an application by the county commissioners to the District Court, to appoint a committee, under the Statute of Maine, of 1842, c. 33, to lo-

43. A, a settler on lands of Massachusetts, in Bangor, within the terms of the Resolves of June 25, 1789, sold one acre to B; and afterwards the remainder of the lot to C, who transferred it to D and his associates. D, &c., received from the committee of the State a deed of the whole lot, as assignees of A, having complied with the prescribed conditions. D always occupied after his purchase, and B lived in another town, and never exercised any ownership till after the grant by the committee to D. D brings an action against E, a grantee of B, for a part of the acre. Held, E might allege that the deed of the committee was void, for fraud, as to the acre, notwithstanding the clause in the act of separation, confirming all grants of Massachusetts; that B represented a settler within the meaning of the resolves, and might therefore claim to be confirmed in his title; and that the deed was void, if D took it fraudulently, knowing the acre to be included, though the committee did not know it.(1)

44. Under a resolve of the legislature, a commissioner appointed to report the names of settlers in the town of S, and the quantity of land to which they were entitled, reported, among others, "to the heirs of A, 200 acres." The legislature afterwards accepted the report, and *confirmed and granted* the lands to the proprietors, and their heirs and assigns respectively, and authorized the selectmen of S to release for a small price to each person, "and to his or their heirs and assigns," the title of the State. A had previously died, having devised his land to his wife for life, remainder to two of his sons. The selectmen released to "the heirs of A." Held, the resolve passed the title to the proprietors, &c., upon condition subsequent of paying the money; that it enured to the benefit of the assignees and devisees of the proprietors, &c., named, who were entitled to deeds from the selectmen, the word *and* being construed to mean *or*, according to the intent of the grant; that A had a devisable interest, and his devisees should hold against his heirs.(2)

45. The proprietors of a large tract conveyed to A by metes and bounds, and contracted to sell him an adjoining parcel, which he accordingly entered and fenced. Afterwards, they conveyed to B all their unappropriated lands "in the tract, bounding on land of A," whose deed was not recorded. Held, the part occupied by A did not pass, as *unappropriated*.(3)

46. Grant by the State of a township, with a reservation that every one settled thereon, prior to a certain day, should receive a deed of a 100 acre lot from the grantee, on payment of a certain sum before a certain day. Held, the grantee gained a title in fee to the whole land; and that a settler could not claim a deed, without paying the appointed sum at the appointed time.(4)

47. A grant by proprietors, made by vote, cannot be revoked by a subsequent vote at an adjourned meeting. Nor is the grantee, by ma-

(1) *Lapish v. Wells*, 6 Greenl. 175.

(2) *Sargent v. Simpson*, 8 Greenl. 148.

(3) *Thorndike v. Barnett*, 2 Greenl. 312.

(4) *Hovey v. Deane*, 1 Shepl. 31.

cate the lands reserved for public uses, in a township granted by the State, by Statute of 1828, is necessary; but notice is to be given, before the committee proceed to discharge their duties. *Ib.*

Inhabitants of the county in which the lands lie may legally be appointed on such committee. *Ib.*

king his claim under the first vote, precluded from denying the validity of the second. (See sec. 38.)

48. So, where proprietors vote a certain easement, and the party enters, his title is good, without registration, against subsequent purchasers.(1)

49. In New Hampshire, in case of a grant or charter from the State, made upon the condition of settling or improving within a certain time, and a forfeiture; a process is provided, by which the State reclaims the land. If a jury find a forfeiture, the court may grant a hearing in equity. A judgment vests the land in the State, without entry, unless some one is in possession, and has been long enough to bar a private claim. A second grantee of the land may appear and claim on account of his improvements; and the court may either allow for them, adjudge the land to him upon his paying for it, or give him his election. An original grantee shall also be allowed for improvements.

50. Land commissioners are appointed to sell or lease the public lands. Deeds or leases, to be of any effect, must be recorded by the Secretary of State within one year.(2)

51. Proprietors of common and undivided lands in the township, are corporations, and may make partition, and, in certain cases, convey, by vote.

52. But where they voted that one of them should have certain lands, and that their clerk should give him a deed in their name, and he made a deed in his own name, as clerk; held, nothing passed by the vote and deed.(3)

53. A mistake in the charter of a township cannot be corrected by a court of law, in a suit between individuals.(4)

54. No particular terms are requisite for a grant by the legislature.(5)

55. In Rhode Island, an ancient act (1682) confirms the grant made by Indian sachems to the inhabitants of Newport, Providence, Portsmouth, Warwick and Westerly, prior to the charter of Charles II, authorizing the assembly to regulate such purchases. Another act (1746) confirms the grant made by the late colonies of New Plymouth and Massachusetts, or the Province of Massachusetts Bay, in Bristol, Tiverton, and Little Compton, Warren and Cumberland, as if within their limits.(6)

56. In Vermont, the court may inquire into the validity of a grant, or charter, or the performance of conditions contained therein, (with provisions similar to those in New Hampshire, sec. 49.) The act is said not to apply to grants, &c., made by or under the authority of the State. A subsequent statute makes it applicable to all cases relating to grants of land in the State.(7)

57. By an act of 1789, past grants by *resolutions* are made valid.(8)

58. A statute recites, that lands had been given "to the Society for Propagation of the Gospel in Foreign Parts;" that, by the revolution, this

(1) Pike v. Dyke, 2 Greenl. 213; Preble v. Reed, 5 Shepl. 169; Evans v. Osgood, 6 Shepl. 213.

(2) N. H. Rev. St. 409, 10, 53. See Brown v. Edson, 23 Verm. 435.

(3) Coburn v. Ellenwood, 4 N. H. 99; Atkinson v. Bemis, 11, 44.

(4) Enfield v. Permit, 5 N. H. 280.

(5) Ib.

(6) R. I. L. 446-7; Ib. 447-8.

(7) 1 Verm. L. 189-90-1; Verm. Rev. St. 228-30. See Summer v. Conant, 10 Verm. 9.

(8) Ib. 193.

society had become foreign and *alien*, and its lands vested in the State. The act proceeds to grant them to the towns where they lie, to lease them *while water runs, or wood grows*, for the benefit of schools.(1)

59. Other acts, reciting that *glebe rights*, granted by the British government in aid of *the national religion*, have, by the revolution, as *public reservations*, vested in the State; grant them to the towns, to be leased for the benefit of the schools.(2)

60. It is further provided, that lands granted to or *sequestered* for schools shall be leased by the selectmen for not more than ten years.(3)

61. Another act provides, that lands granted to the *first settled minister* may be leased. Also those for *the use of the ministry, and social worship of God*. The proceeds are to be equally distributed in the town for these objects.(4)(a)

62. Grants, charters and patents, made by or under the late colony of New York, except in confirmation of those of New Hampshire, are declared void.(5)

63. The statute of limitations does not apply to State lands, or those given for public, charitable and pious uses, excepting lands given to the Society for Propagation of the Gospel.(6)

64. It has been held, that a lease of *glebe lands* by selectmen, not conformable to the statute, and also a conveyance in fee of such lands, are void.(7) Also, that the right granted to *the first settled minister* does not vest, but remains under the temporary control of the legislature, and its avails are subject to their disposal, till such minister is settled.(8)

65. In New York,(b) the sales of public lands are put under the direction of commissioners. They are to be sold at auction; each lot separately, and not over 20,000 acres at one auction. Not less than 25, nor more than 75, per cent. to be paid down; the remainder secured, within 48 hours, by a penal obligation, and to be paid in six equal annual payments. The surveyor-general gives a certificate to the purchaser. The latter, unless expressly authorized, cannot cut wood or timber, unless for fences or buildings, or for firewood, or for purposes of cultivation. Whenever the purchaser, his representatives, &c., produce to the commissioners the surveyor's certificate, with a receipt of the treasurer indorsed for the whole price, the obligation shall be cancelled and letters patent issued. So where the certificate is lost or wrongfully withheld from the owner. Where one dies, having a *pre-emptive* right, the commissioners may decide in whom such right vests; and the party shall stand on the same footing with other purchasers of public lands. If the lands are not sold at auction, they may be offered at private sale; and, if necessary, the minimum price reduced. Where a tract ordered to be sold was occupied February 17, 1809, and im-

(1) Ib. 193-4-9.

(2) Ib. 194-5-8.

(3) Ib. 195.

(4) Ib. 196-7-8-9.

(5) Ib. 508.

(6) Ib. 292. 293.

(7) *Lampson v. New Haven*, 2 Verm. 14; *Bush v. Whitney*, Chipm. 369.

(8) *Poultney v. Wells*, 1 Aik. 180. See *Dow v. Hinesburgh*, 2, 18.

(a) By the Revised Statutes, the selectmen have charge of glebe lands. These are applied for benefit of schools. Those given to the use of the ministry, to the societies of the town in which they lie. Rev. St. 403. See 1, 206.

(b) As to the disposal of *escheated* lands in this State, see *Engleish v. Helmuth*, 3 Comst. 294.

proved to the value of twenty-five dollars, the occupant may recover such value from the purchaser, to be fixed by appraisement, as at the time of sale; allowance being made for the use of the land and the cutting of the timber. The amount shall be paid before any patent issues. But the provision as to improvements does not apply to lands previously sold by, or escheated or confiscated to, the State, or purchased by the State, at a sale by virtue of any security, or conveyed to the State by its debtor. The heirs or devisees of one to whom a grant has been ordered, and who has since died, may obtain a grant, on fulfilling the conditions. If of age, they shall execute any securities which the deceased was to have executed. If minors, an account shall be opened with them in the public offices for the sums due; upon payment of which a grant may issue, and, upon non-payment, the land may be resold. Where one becomes entitled to a grant under a special law, he shall apply for it, unless otherwise expressed, within one year. After a year from the time when any payment falls due, the obligation may be sued, or the land resold. If the latter case, previous payments are forfeited. If the amount due upon the land is not bid, it shall be purchased for the State, and may be resold, giving preference to the former owner, if he applies within three months. In case of resale, a summary process is provided for ejecting any occupant. The obligations may be cancelled, upon surrender of the certificates. Special provisions are made with regard to lands in the fourth senate district. The attorney-general may obtain partition of any State lands owned in common, &c. Lands under the waters of navigable rivers, or lakes, may be granted to the adjacent proprietors only, with certain restrictions relating to the neighborhood of New York city, and upon public notice of an application therefor. The cutting or carrying away of timber, upon the State or Indian lands, is prohibited, under a heavy penalty. Where lands belonging to the canal fund are sold, 50 per cent. is required to be paid, or secured on other property, and the balance secured in three yearly payments.(1) In all grants of public lands, there is an exception and reservation of gold and silver mines. If the title to the lands fails, the price shall be refunded.(2)

66. In case of a sale of land by the attorney-general, three months' redemption is allowed. The treasurer shall pay the purchaser the costs of sale and interest, paid to the treasury by the party redeeming. In case of resale by the surveyor-general, the certificate states the amount due, and that the land is redeemable. The first purchaser may redeem within three months; if he does not, a patent may issue, or a certificate, a bond being given back, on payment of the sum due. Patents, besides being recorded in the office of the Secretary of State, may also be registered, like deeds, in the county registry.(3)

67. It has been held in this State, that a patent of lands occupied by the Indians is valid, though made without their consent. Its validity is a point, which cannot be tried in a suit between individuals, neither of whom claims under the Indians.(4)

68. Government is never presumed to grand land twice.(5) (See sec. 18.)

(1) N. Y. Rev. St. 200-10.

(2) *Ib.* 198.

(3) N. Y. L. 1836, 699; 1845, 89.

(4) *Jackson v. Hudson*, 3 John. 375.

(5) *Jackson v. Murray*, 7 John. 5.

69. In 1667 land was granted to A, who in 1689 sold to B. In 1671, B took out a patent, including land said to be embraced in A's. Held, a party claiming under B was *estopped* to make this allegation.(1)

70. A patent issued in 1737, and another in 1761, reciting the first, and including lands contained in it. The latter patentees purchased under the first patent, and made partition of the lands held under the second, excepting two lots held in the first. The plaintiff, A, brings ejectment, claiming under the second patent, against B, a party claiming under one of the patentees named. Held, the recital of the former patent estopped A from denying it; that B did not necessarily hold under the second patent, because he was a patentee; but that the contrary appeared from the omission of the proprietors to divide the two lots.(2)

71. Where a patent reserves a certain number of acres for public uses, it seems the patentee may elect where to locate the reservation.(3)

72. A patent takes effect from its date, by relation, though sealed afterwards.(4)

73. In ancient patents, where the description of the land is vague, and the construction somewhat doubtful, the acts of parties, of the government, and of adjoining claimants, are entitled to great weight in settling the location.(5)

74. Claimants under different patents, nineteen years before the trial, caused a new survey, and agreed that the line run was the true one, and afterwards repeatedly acquiesced in it. Held, although it might originally, it could not now, be questioned or disturbed.(6)

75. After partition by patentees, possession taken according to a survey and map, and the lapse of forty years: they cannot dispute the correctness of the actual locations.(7)

76. Where a location is made under a deed and survey, and undisturbed possession held accordingly for 38 years; such location is binding, though proved by a subsequent survey to be inaccurate. So, after 41 years of occupancy, a boundary cannot be disturbed.(8)

77. A defendant, for the purpose of showing a title, introduced letters-patent from royal governors, dated 1686, and 1715. These patents embraced the manor of Livingston, of which the premises in question were a part. The defendant traced his title up to the original patentee. Held: 1. That if either of the patents was valid, the plaintiffs could not recover; the premises being included in each grant, and the legal title to the manor being, by virtue thereof, in the defendant's ancestors at the time of the American revolution; it not being claimed that, prior to the revolution, the lands reverted to the British crown, or subsequently thereto to the people, by forfeiture, escheat, or otherwise. 2. That the patents were both issued, in due form, to pass the title of the crown; and that nothing appeared upon their faces to render them void. 3. That the proof did not show, affirmatively, that they were issued without authority, and, in the absence of such proof, the grants were plenary evidence of authority in the colonial governors. 4. That

(1) *Ib.*

(2) *Jackson v. Wilson*, 9 John. 92.

(3) *Jackson v. Smith*, 9 John. 100.

(4) *Heath v. Ross*, 12 John. 140.

(5) *Jackson v. Wood*, 13 John. 346.

(6) *Jackson v. Van Corlaer*, 11 John. 123.

(7) *Jackson v. Vedder*, 3 John. 8.

(8) *Jackson v. Dieffendorf*, 3 John. 269;
— *v. Murray*, 7, 5; — *v. McCall*,
10, 377; — *v. Scoonmaker*, 7, 12, 238;
8, 367, 394; 9, 100; 11, 163.

the patents being evidence *prima facie*, that they were regularly issued, and that all the preliminary requisites had been complied with; the proof in opposition thereto was too conjectural, unsatisfactory and insufficient, on which to find the fact of irregularity. 5. That if the patents were obtained by fraud, or misrepresentation, they could not, for that reason, be assailed collaterally, in an action of ejectment; but could only be avoided by a regular course of pleadings on bill or *scire facias*, in which the fraud or misrepresentation was directly put in issue.(1)

78. It is not a valid objection to a patent, that it is not signed by the governor, provided the great seal is attached. This authenticates the patent, and is *prima facie* evidence, that the patent was approved by the governor, and issued by his direction.(2)

79. The authority to the commissioners of the land office, in New York, to grant land under the waters of navigable rivers, may be executed by letters patent, under the seal of the State.(3)

80. Such a patent, though not containing a reservation of gold and silver mines, is not for that reason void.(4)

81. A grant of lands by patent, under the seal of the State, is *prima facie* evidence that it was regularly issued, and that all things preliminary had been performed and complied with; and where one makes title, under such patent, to lands which were under water at the time of the grant, it is not necessary for him to show that notice of the application for the grant, as required by the statute, was given. And where such patent, granted to a turnpike company, bounded the lands under water, which were the subject of the grant, by the *terminus* of the turnpike road of such company at the margin of the water; held, this was conclusive evidence, for the purposes of a suit of ejectment by the State against those claiming under such patent, that the grant was made to "the proprietors of the adjacent lands;" also, that such patent could not be invalidated, by proof that it was granted for other purposes than to promote the commerce of the State; as, for example, to a turnpike corporation.(5)

82. Where, in an action brought by the attorney-general, to vacate letters patent granted by the king of Great Britain, more than one hundred years since, the facts stated in the complaint show that the plaintiffs never had any title or possession, and do not show that any right of action has accrued to the people, or to the king under whom they claim, within forty years next before the commencement of the action; the action cannot be maintained.(6)

83. Where letters patent are sought to be vacated on the ground that they were granted upon false suggestions, it must be proved that the suggestions were material as well as false.(7)

84. The fact, that some of the grantees in a patent were trustees for one of their number, and released their interest to him soon after the grant was made, is no evidence of fraud in obtaining the patent.(8)

85. Where a patent was granted by the king of Great Britain, in 1737, of lands in New York, subject to the payment of an annual rent

(1) *People v. Livingston*, 8 Barb. 253.

(2) *Ib.*

(3) *The People v. Mauran*, 5 Denio, 389.

(4) *Ib.*

(5) *Ib.*

(6) *The People v. Clarke*, 10 Barb. 120.

(7) *Ib.*

(8) *Ib.*

to the king or his successor, and, twenty-four years afterwards, the colonial legislature passed an act to provide for the more effectual collecting of quit-rents, due and to become due from all the grants and patents within the colony, including the one in question; such act is a confirmation of the original grant.(1)

86. The 433d section of the Code, authorizing an action to be brought by the attorney-general, in the name of the people, for the purpose of vacating or annulling letters patent granted by the people of the State, does not extend to letters granted by the king, prior to the revolution (2)

87. A survey may be corrected, as to the lines, in conformity with the patent and with a map on file in the public office.(3)

88. In Pennsylvania, by act of November 27, 1779, the estates of the late proprietaries were vested in the State.(4)

89. By a Statute of 1781, it is provided that persons, who, prior to Dec. 1776, had become entitled to lands under any grant, warrant or location, may receive a patent, or a survey (if necessary) and patent, upon payment of the purchase-money, or so much thereof as remains due; one-quarter in one year from the passage of the act, one-quarter in two years, one-quarter in three years, the rest in four years. In default of payment for six months, the lands to be sold, unless in case of actual settlement, and where the owner has been expelled by the enemy. Patents are given by deed-poll; free from all reservations and restrictions, except a reservation of one-fifth of gold and silver ore, to be delivered at the pit's mouth. The act does not apply to any grant, &c., after July 4, 1776, for land within ten miles of Philadelphia, or three miles from a county town, or for more than 500 acres in one tract, or to lands not granted in the usual forms of the land office, or those not within the Indian purchase. *Location* means an application in the office of the secretary of the late land office, entered there, numbered and sent to the surveyor general.

90. By Statute of 1784, it was provided, that the land office be opened for lands purchased from the Indians, at the rate of £10 per 100 acres, or £3 10s. for those west of the Alleghany. The applicant must produce a description of the lands, with a certificate whether they are improved. Not more than 400 acres to be granted to one person. All titles under the late proprietaries to be located to the lands already purchased from the Indians.

91. By another act of 1784, provision is made for sale of the lands purchased by the proprietaries from the *Six Nations*, November 5, 1768, at the rate of £30 per 100 acres, a survey not exceeding 1000 acres, with six per cent. for highways, payment to be made in full before receiving a warrant. The warrant to be located at the pleasure of the holder, (some appropriated lands excepted,) but all in one tract.

92. By Statute of 1785, the secretary of the land office is to issue warrants to applicants, successively, in the order ascertained by a lottery, (now obsolete,) the warrants to be numbered according to priority, and directed to the surveyor. But the prior right is lost, unless the warrant be left with the surveyor within thirty days from date. Also unless the survey, if made on or before December 31, is returned to

(1) *Ib.*

(2) *Ib.*

(3) *Jackson v. Hunter*, 1 John. 495.

(4) *Pard.* 518.

the surveyor general, on or before March 31, ensuing. (The whole land to be surveyed in one tract, not containing in front, on any river,^(a) more than one-half of its length or depth, and to be, as nearly as possible, an oblong of three^(b) times the breadth thereof. Where a survey contains more land than the warrant, unless the excess is more than 1-10, the return shall be admitted, the surplus price being paid. (Re-enacted in 1792.)

93. By another act of 1785, further provision is made for patents to purchasers prior to December 10, 1776, on their paying or giving bonds for the price, secured by mortgage.

94. By act of 1792, where a warrant, issued since April 1, 1784, fails of execution by a prior appropriation of the land, the party shall be credited with the sums paid, towards other lands. Lands lying north and west of the Ohio and Alleghany rivers, and Conewango Creek, to be sold to settlers for £7 10s. per 100 acres, with 6 per cent. for roads. A warrant for survey issues, on application, (with a particular description,) for not more than 400 acres, on payment of the price. No tract to be surveyed, if settled and improved, except for the settler himself. Where one has settled and improved the lands above mentioned, he may claim to have a tract, not exceeding 400 acres, surveyed and marked out. A warrant or survey shall be invalid, unless the party has already made, or shall, within two years, make a settlement, by clearing, fencing and cultivating at least two acres for every 100, erecting a dwelling, and residing, or causing a family to reside thereon, for five years next after the first settlement, if he shall so long live. Upon failure of such settlement, new warrants may be issued. But prevention or expulsion by public enemies shall be a sufficient excuse for the default, if the party attempt to make the settlement. The lands remain chargeable, in every one's hands, with the price. A settler loses his rights, unless he apply for a warrant in ten years from the act, not being prevented by death or violence, (as above;) and a warrant may issue to others. Where any *caveat* is determined, (according to the usage,) a patent shall still be withheld for six months, to give opportunity for an action at law. The party prevailing upon the *caveat* is understood to have possession. After six months, or after a decision of the suit, if any, a patent issues.

95. Statute of March 6, 1793, limits the above provision, (sec. 87,) as to credits for overpayments, to January 1, 1795.

96. By act of April 22, 1794, warrants for land within the *New Purchase*, and the triangular tract upon *Lake Erie*, are limited to settlers; and applications for lands are restricted to a certain time.

97. By act of April 20, 1795, any citizen, residing not less than 100 miles from Philadelphia, has a prior claim for not more than three patents. But no one shall be preferred a second time.

98. By act of January 22, 1 02, the effect of a *caveat* is limited to two years, unless followed by a citation.

99. By act of April 2, 1802, where the secretary supposes that land applied for has been taken up, he shall issue a certificate (in form

(a) This word applies only to large streams, technically called *rivers*. But the act is held to be merely *directory*, and not to render void proceedings which do not precisely conform to its terms. *Wyncoop v. Heath*, 4 Watts, 428. See also, as to this statute, *Prout v. Burd*, Ib. 375.

(b) By act of 1792, *twice*.

prescribed) instead of a warrant, upon proof that the applicant is in possession.

100. By act of April 4, 1805, a warrant shall be filed with the surveyor within two years; else it is void against a later warrant, or a settlement.

101. By act of February 21, 1810, patents may issue to trustees, guardians, or executors, in certain cases, upon their giving a mortgage. Payments may be made, upon such mortgage, of the whole sum, or a part, before they become due.

102. By act of March 20, 1811, wherever an original warrant-holder, or his representative, and an actual settler, have agreed, previous to the settlement, to improve land, lying north and west of the Ohio and Alleghany rivers, and Conewango Creek, and improvements have been made, (according to Statute of April 3, 1792,) the title is confirmed to the parties, saving, however, any adverse right. Where a settler has occupied *adversely* to the *warrantee*, if the parties, before June 1, 1813, shall make a compromise, either by a release from the warrantee of 150 acres, with the usual allowances, to be legally surveyed, without consideration, and including the improvements, or by either party's buying the other's right; the title of the State is relinquished. So where such settler has purchased any part of the land from the warrantee, to include and secure his improvement, and the latter, before June 1, 1813, shall release 150 acres, and allowance of 6 per cent., without consideration. All settlers, adverse to the warrantees, who have occupied two years, and cleared, fenced and cultivated three acres, and abandoned their settlements, before completing them, according to the act of 1792, and who shall, before June 1, 1813, return to the land, and make up the deficiency of occupation, may be treated as actual settlers. Otherwise, the warrantee has an exclusive title. Any settler, who has commenced an adverse settlement on land surveyed, and has been legally evicted by the warrantee, shall be held an actual settler; and the right of the State is relinquished upon any settlement between the parties (as above, not limiting the time, however, to June 1, 1813.) Where there has been no actual settlement, but the warrantee shall agree with any person to make one before June 1, 1814, (1813?) and release to him 150 acres and allowance, and such person shall commence and continue for five years a settlement thereupon, and clear, fence and cultivate at least two acres for every hundred, and erect an habitable dwelling; the title of the State shall cease. Where *prevention* patents have issued to such parties, a new patent may be had on giving up the old one. In any case of compromise, as above, where a new warrant of default has issued, the price for the vacating warrant shall be repaid. The above provisions are not to affect any agreement between an actual settler and any one who was to procure a title for him, where the original warrantee has failed to perform the conditions of the act of 1792; unless a compromise takes place between all parties concerned, before June 1, 1813, or such grantee shall release to the contracting parties; in which cases, the title of the State shall cease. The above compromises shall be recorded; and, upon a certified copy thereof being sent to the land office, and the usual proof of settlement, &c., a patent shall issue. Where a settler, under the act of April 3, 1792, has purchased the

right of a warrantee, he may receive a patent on proof of settlement and of title under the warrantee, and payment of the amount due; subject to the claim of forfeiture by the State under said act.

103. By act of April 2, 1811, patents may issue on past surveys, though exceeding, by more than 10 per cent., the amount in the warrants, saving rights by improvement to the excess. By act of February 7, 1812, in case of settlement, no further evidence is required for a patent, than that upon which the warrant was granted, unless there are adverse claims.

104. By act of March 22, 1813, warrants and patents may issue to settlers on the *depreciation* land, north and west of the Ohio and Alleghany rivers, surveyed and not validly sold, nor otherwise appropriated, as in case of other lands, except those parts surveyed on warrant, or for which descriptive warrants have been entered before the settlement. Previous warrants and patents of such lands to settlers are confirmed. Where any warrant, (except a warrant of acceptance,) has issued for such land, and a survey been made, and there has been a subsequent adverse settlement; in case of compromise within two years, according to the act of March 20, 1811, a title shall issue. But the State shall not be bound to refund any money. Where an adverse settler has improved land north and west of the Ohio and Alleghany rivers, and Conewango Creek, surveyed on original warrant, and has compromised with the warrantee prior to the act of March 20, 1811, which is duly proved, the title of the State shall cease. This does not apply, where less than 150 acres have been agreed to be conveyed to such settler, or, if the warrantee supplied the means for improving 50 acres.

105. By act of March 14, 1814, in a suit by a warrantee against a settler, the former must prove an entry within two years from date of the warrant, or an attempt, and prevention by the public enemy, and that he persisted two years to settle and improve; or else a settlement, &c., under the act of 1792. But no settler shall avail himself of this act, if the warrantee shall tender a deed of 150 acres within two years of April 1, next, according to the act of March 20, 1811. The act shall not affect past contracts between settler and warrantee.

106. By act of January 25, 1816, a patent shall certify the amount due, which shall be a lien on the land. The party may at any time pay the whole, or a part of the debt. A patent shall be recorded, in the county recorder's office, in six months, else it is void. It may issue to a trustee, guardian, or executor, empowered to dispose of the land. The lien upon the land may be discharged upon the record.

107. By act of March 19, 1816, such parts of the act of March 20, 1811, as have expired, are revived, and agreements made within two years from the first of April next,^(a) shall be valid.

108. By act of March 10, 1817, warrants may be issued of land within the Indian purchase of 1784, east of the Alleghany river, and Conewango Creek, at \$26 66 per 100 acres.

109. By act of March 13, 1817, warrants of acceptance and patents may issue upon surveys, though exceeding by more than 10 per cent. the warrant, location or order, unless the surplus is more than 100 acres; with a saving of adverse rights.

(a) Afterwards further continued.

110. By act of March 22, 1820, where one holds by warrant and survey, or patent, and also by a proprietary warrant or location, he may be credited with the amount paid on the new warrant.

111. By act of April 1, 1823, the provisions of a former statute as to the execution of a mortgage, &c., are substantially re-enacted; not applying, however, to lands north and west of the Ohio and Alleghany Rivers, and Conewango Creek, or within the 17 townships in Luzerne county, or held under the proprietary government.

112. By act of April 8, 1829, any person taking out a patent is required to give a mortgage, payable in six instalments, which shall appear by the patent. The patent is void, unless recorded in six months. Payment of the amount due may be certified on the record, which shall be *prima facie* proof of the fact. This act does not apply to lands north, &c., of the Ohio River, &c.

113. By act of March 10, 1830, where land subject to lien or mortgage has passed into the hands of different holders, any one may obtain a discharge of his part, by paying the proportional share of what is due.

114. By act of April 6, 1830, a greater surplus than 10 per cent. shall not be surveyed upon a warrant. Any excess, not exceeding this amount, shall be paid for at the return of the survey.(1)

115. By act of March 22, 1820,(2) relating chiefly to *remedies*, and, therefore, omitted in order of time, where sums due for lands purchased remain unpaid, and a suit is brought against the owner or occupant, the defendant may have a stay of execution for one year from return of the writ.(a) In case of sale on execution, if the sum due is not bid, the land is purchased for the State. A patent may issue, upon a location or other office right, to a party entitled, previous to, or within nine months after, such suit brought, upon payment of the sum due, or securing it by mortgage, payable in ten instalments. The giving of such mortgage shall appear by indorsement upon the patent. Upon failure thus to pay or secure the price, a suit shall be commenced, but not till after a month from breach of condition. Such mortgage shall not deprive the party of the rights of a freeholder. The instalments may be paid before they fall due. No suit shall be brought against a person claiming under the proprietary government prior to April 1, 1821. Where lands held by office rights have not been surveyed, the holder may procure a survey, and receive a patent.

116. By act of May 3, 1832, surveys returned and accepted are declared valid, though made on the ground, before the warrants were delivered to the surveyor; saving the rights of third persons.

117. By act of April 3, 1833, settlement, improvement, &c., are dispensed with, in relation to lands sold under the act of April 3, 1792, and a patent may issue therefor, upon fulfilment of other conditions. This, however, is not to affect any title gained by settlement, &c.(3)(b)

(1) Purd. Dig. 514-64. See *Marcy v. Gardiner*, 7 Watts, 240; *Chew v. Morton*, 10, 321. (2) Purd. 552. (3) Parke & J. 361-3.

(a) See further, on this point, Purd. Dig. 559.

(b) With regards to lands appropriated for the benefit of revolutionary officers, see *McCall v. Yeple*, 4 W. & Serg. 168; — *v. Coover*, 141.

As to *unseated* lands and taxes thereupon, see *Urket v. Coryell*, 5 Ib. 60; *Bunting v.*

118. The following are some of the judicial decisions in Pennsylvania, in relation to the public lands.

119. It is said, the Penn family were sole proprietaries, as *individuals*, of the soil of the State; subject only to trusts in favor of such persons as should become equitably entitled to portions thereof, under general promises or regulations established by them.(1)

120. Title to public lands may be gained in two modes; 1. By warrant, or location, and survey; 2. By actual, resident settlement. But no mere acts of ownership, however long continued, will raise the presumption of a grant. In order to claim under an improvement, a party must commence it with a view to immediate settlement, and prosecute it diligently and effectually. In such case, the title *relates* to the beginning of the improvement.(2)

121. The time within which such a survey shall be returned is not definitely fixed, but depends on circumstances. It seems, seven years shall be the time, in analogy with the limitation in the act of March 25, 1785.(3)

122. A precisely descriptive warrant does not give a title from its date, unless followed up with reasonable attention. So of a vague warrant from the time of survey.(4)

123. An application and survey may be abandoned; but the question is for the jury.(5)

124. *Improvement* requires merely *clearing* and *cultivating* the land; but *settlement* requires *actual residence*. But the accidental clearing over the boundary of patented land is no *improvement*, and gives no interest in vacant lands of the State.(6)

125. A settlement, made with intent to take up the whole of a vacancy, gives legal possession of the whole; and any stranger entering is a trespasser.(7)(a)

126. An early resident settlement will be preferred to a patent, unless the former right has been abandoned.(8)

127. Settlement rights descend like other lands. They are also subject to sale on execution, and the purchaser may go on and complete his title. So land held by warrant and survey descends, may be devised and conveyed, and is subject to dower and curtesy, like other lands. So ejectment lies for it.(9)

(1) Penn v. Kline, 4 Dall. 406; Conn v. Penn, Pet. 498, n.; Penns v. Klyne, 1 Wash. 207. (2) McMutrie v. McCormick, 3 Penn. 428. (3) Star v. Bradford, 2 Penn. 384. (4) Chambers v. Mifflin, 1 Penn. 74. (5) Adleman v. Masterson, 1 Penn. 454. See Butting v. Young, 5 Watts & S. 188.	(6) Bixler v. Baker, 4 Binn. 218; Gilday v. Watson, 5 S. & R. 266; Morris v. Thomas, 5 Binn. 77. (7) Gilday v. Watson, 2 S. & R. 410. (8) Elliot v. Bennet, 3 Yeates, 287. (9) Workman v. Gillespie, 3 Yeates, 571; Maclay v. Work, 8 Binn. 158; Myers v. Myers, 8 Watts, 430.
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Young, Ib. 188; Forster v. McDavit, Ib. 359; Hunter v. Albright, Ib. 423; Woodburn v. Farmers', &c, Ib. 447; Mitchell v. Bratton, Ib. 451; Bayard v. Inglis, Ib. 465; Baird v. Cahoon, Ib. 540; Dunn v. Ralyea, 6. 475; Church v. Riddle, Ib. 509; Thompson v. Fisher, Ib. 520; Driesback v. Berger, Ib. 564; Houston v. Sims, 12 Penns. 195; Heath v. Armstrong, 12 Penn. 178; Penns. St. 1842, 265-6. See further, St. 1841, 164; 1842, 216; 1840, 329, 351-2.

(a) If a party enter upon land north of the Ohio and west of the Alleghany rivers, make improvements, and procure a surveyor to survey without warrant or other authority; the survey shows the extent of his possession, and after twenty-one years he gains a title to all within its limits. Lawrence v. Hunter, 9 Watts, 64.

128. It is said to be against conscience to take out a warrant for land subject to a prior warrant, and paid for. Nor does the omission of a survey authorize any presumption of abandonment, where the warrant is descriptive. But want of due diligence in obtaining a survey forfeits the prior right.(1)

129. An application for land gives an imperfect or inchoate right, which may be perfected by subsequent proceedings, or abandoned, or lost by want of due diligence in prosecuting it. An unexecuted warrant in the hands of a surveyor is not subject to execution. If sold on execution, one claiming under a subsequent survey and warrant will hold.(2)

130. An improvement must be prosecuted with reasonable diligence, and consummated by actual residence. Any interruption in such residence will be excused, it seems, only by force, which endangers one's safety, or a call to defend the country.(3)(a)

131. In some cases, the facts being settled, abandonment becomes a question for the court, not of intention, for the jury, although, generally, it is a question of fact. And where, after occupying two years, one quits the land for five years, the court is bound to instruct the jury, that this is an abandonment. But an interruption for six months is not *per se* an abandonment.(4)

132. Though a warrant be very precise and descriptive, the party is bound to show the lands to the surveyor, and to furnish or pay for provisions and chain carriers. If the survey is made in his absence, the surveyor is held to be his agent, by whose acts he is bound.(5)(b)

133. Marked trees and lines are the true survey. The return is but evidence, to be controlled by the actual survey.(6)

134. A patentee, not entitled to the land, is a trustee for the true owner. And a person cannot recover land merely because his name is the same as that used in a warrant. He must also prove that he paid for such warrant, procured the survey, or otherwise gained title. Though A wrote the application, yet if B paid the price, and procured and paid for the returns, A gains no title.(7)(c)

(1) *McCullough v. Wallace*, 8 S. & R. 181; *Gordon v. Ker*, 1 Wash. 322.

(2) *Philips v. Shaffer*, 5 S. & R. 215; *Blaine v. Crawford*, 1 Yeates, 289; *Drinker v. Holiday*, 2, 88; *Ewing v. Barton*, *Ib.* 318; *Heath v. Knapp*, 10 Watts, 405.

(3) *Atchison v. McCulloch*, 5 Watts, 13.

(4) *Ib.*; *McDonald v. Mulhollan*, 5 Watts, 173; *Goodman v. Losey*, 3 Watts & S. 526;

Miller v. Cresson, 5, 284; *Forster v. M'Divitt*, *Ib.* 359. See *Railroad v. Hoyer*, 2 Bland, 259.

(5) *Hunter v. Weaver*, 4 Yeates, 107.

(6) *Yoden v. Fleming*, 2 Yeates, 311; *Hall v. Powell*, 4 S. & R. 462. See *Wray v. Miller*, 2 Harr. 289.

(7) *Duer v. Boyd*, 1 S. & R. 203, *Urket v. Coryell*, 5 Watts & S. 60.

(a) Where a party has obtained the warrants and surveys, and paid the whole price to the Commonwealth, an abandonment is not to be presumed against him from lapse of time; but there must be an actual ouster for twenty-one years. *Urket v. Coryell*, 5 Watts & S. 60. There must be an actual relinquishment of possession, without intention to return. *Ib.*

(b) Where several indescriptive warrants are granted to one person and located on adjoining lands, the surveyor may return one draft of the whole, without running the division lines on the ground, or marking them on the return of the survey; and the return will give a purchaser a good title. *Stevens v. Hughes*, 3 W. & S. 465.

(c) If one wrongfully procure a patent and pay taxes, the true owner may recover the land from him, without refunding what he has paid for the patent or for taxes. *Urket v. Coryell*, 5 Watts & S. 60. Surveys are presumed to be made for the then warrant owner. *Ib.* A warrant, surveyed on the improvement of another, is not *void*, but *voidable*. *Miller v. Cresson*, 5, 284.

135. A patent is *prima facie* evidence of title and survey.(1)

136. Where an improvement right is sold on execution, it cannot serve as a foundation for a warrant and survey.(2)

137. The holder of such right may maintain ejectment, not only for the cleared, but uncleared portion, included within his ascertained bounds.(3)

138. Land in and adjoining the city of Philadelphia has never been considered as within the jurisdiction of the land office, so as to be the subject of grant by warrant, survey and patent. So with lands on navigable rivers, between high and low-water mark.(4)

139. Where a settler designates his claim by lines upon the ground, including 6 or 700 acres, he cannot claim to be consulted by a subsequent warrantee, who locates by survey. The latter is only bound to leave him 400 acres, in a reasonable form, with his improvements.(5)

140. A warrant is valid, though unexecuted for 37 years, unless there is a later claim.(6)

141. But where there is such claim, unreasonable delay, in making and returning a survey, postpones the party, whether the warrant be descriptive or not.(7)

142. An act of 1786 requires "an actual personal resident settlement, with a manifest intention of making it a place of abode, and the means of supporting a family." Held, this intention must be shown by the *raising of grain*. Supporting a family, by the cutting and selling of timber, gives no pre-emption right. So the erection of a house and saw-mill merely with a view to cut timber and turn it into lumber is insufficient. So, *grain* must be raised, meaning thereby some *esculent* production, under the act of 1794.(8)

143. Where a settler has marked no boundaries according to law, his possession is limited by immediate occupancy, more especially in the case of a settler, under the act of 1792, who might have a survey without a warrant, and who cannot recover possession without it.(9)

144. Where a settler enters within two years from the date of a warrant to another, he gains no title by his wrong; but his possession enures to the benefit of the latter. So, where one enters upon land surveyed by warrant, without a vacating warrant, the party claiming by such survey may recover against him, though the former has made no settlement within two years, according to law. So, one may recover against such settler, who claims under a preemption patent of 1808, founded on a warrant under the act of 1793.(10)

145. The practice of including a quantity, exceeding ten per cent. more than the warrant called for, was sanctioned by the proprietaries' land officers, and has been repeatedly recognized by the legislature; and cannot now be questioned, unless it interferes with other rights.(11)

(1) James v. Betz, 2 Binn. 12; Wolf v. Goddard, 9 Watts, 547.

(2) Schall v. Miller, 3 Whart. 250.

(3) Ib.

(4) Freytag v. Powell, 1 Whart. 536.

(5) Atchison v. McCulloch, 5 Watts, 13; M. Donald v. Mulhollan, 5 Watts, 173; Goodman v. Losey, 3 Watts & S. 526; Miller v. Cresson, 5, 284; Forster v. M'Divitt, Ib. 359. See Railroad v. Hoye, 2 Bland, 259.

(6) M'Donald v. Mulhollan, 5 Watts, 173.

(7) Goddard v. Gloninger, 5 Watts, 209; Steimetz v. Logan, Ib. 518; Zerbo v. Schall, 4 Watts, 138.

(8) Gardinier v. Marcy, 5 Watts, 337; Wyncoop v. Heath, 10, 428; Goodman v. Losey, 3 Watts & S. 526.

(9) Ross v. Barker, 5 Watts, 391.

(10) Ib.; Campbell v. Galbreath, 5 Watts, 423; Barnes v. Irvine, Ib. 497; Smith v. Collins, Ib. 505.

(11) Layton v. Paull, 5 Watts, 465; 4, 442.

146. Where a second survey, procured by a warrantee, does not include land included in a former one, which land is otherwise appropriated, he loses his right.(1)

147. Where a survey is returned, a second one, under the same warrant, without an order of re-survey, is void.(2)

148. A warrant, return of survey, and patent, being proved, together with acts of ownership for more than twenty years, without adverse claim, the law presumes all requisite formalities in favor of the party.(3)

149. A warrant for land, which is improved at the time of application, is not void, but only voidable by the improver, and, upon release of his right, gives a good title.(4)(a)

150. An ancient purchaser, without notice, is not affected by the censurable or even criminal conduct of those who executed the warrant. He must have actual notice of any equitable right; or there must be clear, unequivocal possession.(5)

151. Under the acts of April 3, 1792, April 22, 1794, September 22, 1794, April 2, 1802, and April 3, 1804, where a warrantee fails to commence the settlement, &c., mentioned in the first of these acts, for two years, any one may enter as a settler without a vacating warrant, and may either maintain or defend an ejectment against the warrantee.(6)

152. A vacating warrant is granted, only where there is actual improvement and settlement.(7)

153. A surveyor may, after the survey, protract the lines, and include more land. But, as the lines run and marked constitute the true survey, it is a question for the jury, whether the true one is returned.(8)

154. Where a surveyor has included too much land, he cannot, without consent of the party entitled, throw out a part, including cleared and valuable land. If he does, such party may apply to the Board of Property for a resurvey. But one making a settlement, or purchasing a warrant, before such application, and after return of the survey, will hold the land thrown out, against the other party, especially if the latter has been guilty of long delay.(9)

155. Where twenty-one years have elapsed since a survey, and the owner has occupied, and agreed upon a boundary with the adjoining owner, he is bound thereby, though varying from the survey.(10)

156. Where a survey calls for an adjoining survey as a boundary, this will be held the boundary, though the line run falls a little short of it.(11)

157. A survey may be made of 400 acres, and 10 per cent., upon a warrant for less than 400, where there is an improvement called for, and an established settlement, with boundaries fixed by adjoining surveys.(12)

158. An assessment of warranted land for a disseizing settler, of a

(1) *Layton v. Paul*, 5 Watts, 465; 4, 442.

(2) *M'Kelly v. Gilleland*, 3 Watts, 312.

(3) *Caul v. Spring*, 2 Watts, 390.

(4) *Cresson v. Miller*, 2 Watts, 272.

(5) *Ib.*

(6) *Riddle v. Albert*, 1 Watts, 121.

(7) *Ib.*

(8) *M'Cormick v. M'Murtrie*, 4 Watts, 192.

(9) *Ruggles v. Gaily*, 2 Rawle, 232.

(10) *Mart v. Hartley*, 4 Watts, 261.

(11) *Ib.*

(12) *Beeson v. Hutchinson*, 4 Watts, 442.

(a) Where a settler becomes resident on land previously appropriated, by clearing, cultivation and enclosure, he in general gains no title; though, under some circumstances, he may. *Adams v. Jackson*, 4 Watts & S. 55.

less quantity than is called for by the warrant and survey, if made by his procurement, or even with his knowledge and acquiescence, will lose to him his constructive possession, by detaching it from the landmarks which had sustained it. To acquire title to the whole tract by the statute of limitations, as against the warrantee, such settler must always have evinced, by declarations and acts, an unintermitted purpose to hold by the lines on the ground.(1)

159. The marks on the ground of an old survey, indicating the lines originally run, are the best evidence of the location of the survey, and, any evidence of such lines should be referred to the jury.(2)

160. Drafts found in the office of the deputy-surveyor, where no authority to such surveyor to make them is shown, may be evidence of boundary, on the part of the claimant under an improvement, if, when the improvement was commenced, the improver claimed to the lines of the draft and adopted them; but the papers of themselves are no evidence of title.(3)

161. The Pennsylvania timber act of 1824 extends as well to unseated as to seated lands.(4)

162. A survey, made by one claiming as a settler upon land already surveyed, concludes him as to that right; and his intention not to abandon part of his settlement is immaterial.(5)

163. Title to islands, lying within the river Susquehanna or its branches, could not be acquired by actual settlement and improvement; but, by the Pennsylvania act of March 6th, 1793, directing the sale of certain islands in the Susquehanna, or its branches, an improver had two years to obtain a warrant and have a survey made, and, in case of his neglect for that time, the island was subject to application by any other person; and though it was incumbent on the improver to state the nature of his improvement, and when and by whom it was made, this was not necessary in the application of another, who applied for the island more than two years after the improver had neglected to make application for it.(6)

164. A person, who takes a warrant for land claimed by him under an improvement, and whose survey is made and returned for a less quantity than is usually surveyed, is bound by such survey; and another warrant, afterwards taken by him under the same improvement, is of no effect as against an intervening right.(7)

165. Where a party applied for land, "adjoining his other lands," and a survey was made and returned, as adjoining his other land, and a patent granted, and the patentee remained in undisturbed possession seventy-five years, and said land, and the other land of the party, were used as one farm, partly cultivated, and the other parts as woodland; a party claiming, under a new warrant, a strip of land alleged to be vacant between the two old surveys, must, in order to establish his title, show clearly that the lines of the two old surveys were actually run upon the land, and that there was a vacancy between them.(8)

166. A party who obtains a descriptive warrant, has a survey made on the ground, pays the purchase-money and office-fees, and fees of the

(1) *Clarke v. Dougan*, 2 Jones, 87.

(2) *Gratz v. Hoover*, 4 Harris, 232.

(3) *Sample v. Robb*, 4 Harris, 305.

(4) *Houston v. Sims*, 2 Jones, 195.

(5) *Ib.*

(6) *Johns v. Davidson*, 4 Harris, 512.

(7) *Hoover v. Lock*, 1 Harr. 356.

(8) *Mahon v. Duncau*, 1 Harris, 459.

deputy-surveyor, continues to claim the land, clears a part, and cuts timber on other parts; is entitled to hold the land, although the return of survey was lost before reaching the land-office, as against a subsequent warrantee, who had actual knowledge of these facts before applying for the land.(1)

167. A party cannot read in evidence a warrant issued since September 22, 1794, when the land office was closed against the issuing of any warrants, except where an actual settlement had been or thereafter should be made, &c.; he should show from the books of the office that the officers were by law authorized to issue it.(2)

168. Where a return of survey calls for an adjoining survey, but the lines on the ground correspond with the courses and distances of the survey returned, the lines on the ground will control the call.(3)

169. If a person claiming in his own right, by settlement and improvement, does not object to the location of a warrant on land adjoining his improvement; his subsequent deed cannot affect the location. But, if he claimed under another when the warrant was located, his agreement to the location cannot affect him under whom he claimed, or his alienee.(4)

170. Drafts of land, offered before any title by warrant, location, or improvement is shown, are not admissible in evidence.(5)

171. Nor is the talk of neighbors as to who has the title in dispute.(6)

172. The terms of a warrant itself must determine what lands it includes, with the aid of other evidence, as to situation. The intention of the party is not to be regarded.(7) (But see sec. 30.)(a)

173. In giving a view of the land laws of Pennsylvania, I should do injustice to my readers and the work itself, not to mention the late valuable treatise of Judge Sergeant upon that subject. I avail myself of this book, to furnish a few additional remarks, which may throw some light upon the foregoing somewhat incoherent collection of statutory provisions.

174. Under Andros, the last of the English governors, (before Penn,) the system was practised of granting by warrant and survey. In 1676, Andros constituted a surveyor for the whole river and bay of Delaware, to give new comers any reasonable quantity of vacant lands, recommending 40 or 50 acres for a head, being as much as could be improved. The party received a *survey plut or card*, which was returned to

(1) Roland v. Long, 1 Harris, 464.

(2) Heath v. Armstrong, 2 Jones, 178.

(3) Thomas v. Mowrer, 3 Harris, 139.

(4) Sample v. Robb, 4 Harris, 305.

(5) Ib.

(6) Ib.

(7) Norris v. Monen, 3 Watts, 465. See further, Wilson v. Wetterson, 4 Barr, 214; Jones v. Brownfield, 2, 55; Farr v. Swan, Ib. 245; Steiner v. Cox, 4, 13; Schuable v. Doughty, 3, 392; Ege v. Sidle, Ib. 115.

(a) If a defendant proves an actual settlement, the plaintiff cannot prove that the defendant purchased and claimed under another title by warrant and survey. Turner v. Waterson, 4 Watts & S. 171. Where one acquires title to four hundred acres by improvement, and sells a part by course and distance, he does not thereby lose his title to the rest, nor does the land become vacant for another warrant. A settler may lose a part of his land by circumscribing it himself, but not by his vendee's doing so. Miller v. Cresson, 5 Watts & S. 284.

A settles four hundred acres. B buys of C one hundred and eighty of them, and A gives to B a written declaration that he has no title to the improvement. Held, there was no estoppel as to the remaining two hundred and twenty, as against one who bought them without consideration or deception. Ib.

the office of records.(1) Penn, after obtaining his charter, and before leaving England, sold large amounts of land to persons called *first purchasers*. These grants were by deeds of lease and release for land in the province at large, not specifying place or bounds. Many of the deeds were lost; but a list of names, containing a warrant executed by Penn for survey of certain quantities of land, has been often admitted in evidence. These grants have been since termed *old rights*, and had peculiar privileges of city and liberty lots. They amounted to more than 300,000 acres.(2) They were granted, to be held in *common socage* of William Penn as of the seignory of Windsor, with a covenant by him to extinguish the Indian title.(3) In disposing of the lands in the State, Penn had them surveyed to purchasers from time to time, as they were sold; instead of surveying them when purchased, and separating them into tracts or lots. It would seem that no title was then permitted by settlement, without an office right.(a) The regular proceeding to pass a title, was the issuing of a warrant from the constituted officer, a survey founded thereupon, a return of such survey, and a patent. But in numerous instances a title was acquired by informal orders, agreements, &c., of the proprietary officers; and it was in one case said by the court, that under this sort of orders great part of the province had been settled. Sometimes quit-rents, though usually part of the consideration, were substituted for purchase-money. In 1705, seven years' possession after entry upon an equitable right was declared to give a good title.(4)

175. After the death of William Penn, and under the government of John, Thomas and Richard, his successors, the project of a lottery for disposing of 100,000 acres of land was started. The lottery was never filled, but many tickets were sold, and became the primary titles to land. Surveys were made, and the lands surveyed were long kept separate. So late as 1769 and 1770, warrants were issued for such lands. In 1738, a proclamation was issued, threatening suits for non-payment of the purchase-money of lands held by warrant and survey, and against those holding by *improvement*; which last rights, it was stated, had been transferred to others.(5)

176. Rights by warrant and survey were at first regarded and treated as personal estate. But about the year 1758, they came to be considered as real, and the title equitable as against the proprietary, and legal as to all other persons. Surveys were sometimes made without warrant, under some general direction from the land office, or usage, and were uniformly sanctioned by the office. They were at first rejected, but afterwards held valid, by the court. After a survey without warrant, a warrant of *acceptance* sometimes issued.(6)

177. In 1765, the *application system* was introduced. Upon application, instead of granting a warrant, the secretary entered in a book the name of the party, &c., and the description or *location* of his land. No application, without special order, for more than 300 acres to one per-

(1) Serg. L. L. 21, 2.

(2) Ib. 23, 4; Hurst v. Dippto, 1 Dall. 21; Morris v. Vanderen, Ib. 64.

(3) Serg. L. L. 24, 5.

(4) Serg. L. L. 33, 4, 5, 6, 7, 41, 4.

(5) Ib. 47, 8, 9, 50.

(6) Ib. 51, 2; Woods v. Galbreath, 2 Yeates, 306.

(a) Entry, without such right, was prohibited in 1729-30, and the party subjected to the process of forcible entry, &c., after any length of possession. Serg. 43. But the act was never enforced, and the forbidden practice continued.

son. The secretary sent every evening to the surveyor-general a copy of the applications, in their order, who issued to his deputies orders to survey accordingly, the applicant showing the land. The surveys were returned, and, upon payment, within six months from the return, of £5 in full for 100 acres, with one penny per acre quit-rent, a *warrant of acceptance* issued, directing the surveyor-general to accept, and make return of survey into the secretary's office. A patent then issued. Persons claiming by settlement or improvement were required to enter applications, and produce evidence of their improvements.(1) By a regulation of 1765, improvements, before the late purchase from the Indians, were excluded, unless the applicant had Secretary Peters' promise of a warrant.(2) The times prescribed for obtaining surveys and patents were not strictly enforced, but extended by subsequent proclamations. Adverse rights sometimes intervened, and hence arose numerous judicial controversies.(3)

178. The above described application system was substantially applied, in 1769, to late purchases from the Indians. But the order of preference was determined *by lot*. Hence a title is often called "lottery application or location of the year 1769." A preference was given to settlers, prior to the purchase, (not since,) "especially those who settled by permission of the commanding officers to the westward." Reservations were made in favor of military officers, and grants to individuals.(4)

179. June 28, 1779, an act was passed by the legislature, vesting the public lands, heretofore belonging to the Penn family, in the State; with an obligation to pay them £130,000 at the end of the war. The act was predicated upon the ground, that the charter to Penn was made for great public objects, and the benefit of settlers, as well as his own private advantage; and that the ownership of a territory so extensive was inconsistent with republican institutions. Existing individual rights were secured, as also the private estates and quit-rents of the proprietaries.(5)

180. In 1784, the legislature first authorized the sale of vacant lands, "agreeable to the former customs and usages of the land offices."(6)

181. Mr. Sergeant gives some account of the *fair-play men*. These were constituted by settlers upon land beyond *Lycoming Creek*, which was by some alleged to be the boundary of the Indian purchase of 1768. The *fair-play men* were three of these settlers, annually appointed by turns, to decide all disputes among their number. Their decisions, when afterwards re-examined, were uniformly found just, and confirmed by the courts. An act of 1784 declared *Lycoming Creek* to be the boundary, but gave the settlers pre-emption rights in the lands, which had been acquired by a subsequent purchase.(7)

182. The act of April 3, 1792, provided that a warrantee should make a settlement within two years, unless prevented by the enemies of the United States, in which case he should persist in his endeavors to settle. Under this act the *Holland Company* took out very numerous

(1) Serg. L. L. 55, 6, 7.

(2) Ib. 58.

(3) Serg. L. L. 60.

(4) Ib. 61, 2, 3, 4; *Buchanan v. McClure*,
1 Binn. 389.

(5) Ib. 66, 7, 8, 9.

(6) Ib. 74, 5.

(7) Ib. 77, 8, 9, 80; (*Hughes v. Dougherty*,

1 Yeates, 497.)

warrants. The question arose, whether the Indian hostilities excused the want of a settlement, or whether, after two years, other settlers were entitled, against the warrantees. The Board of Property, till 1800, held the former opinion; and issued *prevention certificates*, and patents, founded thereon, setting forth the Indian hostilities as an excuse for not making a settlement. A subsequent board took the latter ground and refused patents. In the case of *Morris v. Neighman*, the court held the excuse to be valid; and further, that if it was not, the State alone could take advantage of a forfeiture, by granting new warrants. In the case of *Comm. v. Cox*, Shippen, Ch. J., held the same doctrine, but Yeates and Smith, Js., that the warrantee, though prevented by force from settling within the time, was bound to persist in his efforts till a settlement was effected. In April, 1802, an act was passed, calling upon the judges for their opinion of the point in question, to be given in the mode of a special hearing of parties; the Holland Company protesting against the measure. The court met, and Yeates, J., charged the jury conformably to his previous opinion. In suits subsequently brought in the United States Court by the Holland Company, the question was finally decided in the Supreme Court, substantially in the same way; and this principle was afterwards adopted by the State Court, who held that a warrantee should be reasonably allowed two years after the treaty of peace to make his settlement.(1) To facilitate a compromise between the adverse parties, the laws were passed, (above referred to,) providing for the issuing of patents to both, upon certain agreements made between them.(2)

183. In New Jersey, by an act of 1703, purchases from the Indians, made without public authority, are declared void.(3) An act of 1795 provides, that grants by or under the States shall be held *allodial*.(a) In Delaware, general warrants for location of vacant land are vacated, by a recent act, unless executed. Twenty years' possession bars the State. Owners are allowed partition. Salt marshes are excepted from the statute.(4)(b)

184. In the land law of Maryland, there are striking peculiarities, which probably no one, not familiar with their practical application, can fully understand, and which render that law comparatively useless to citizens of other States, and therefore not a proper subject to be noticed at length in a general work like the present. Although having access to the statutes of this State, I have been able to find very few statutory provisions upon this subject. I derive my impressions of

(1) Serg. L. L. 95, 110; *Morris v. Neighman*, 4 Dall. 209; *Com. v. Cox*, Ib. 170; *Huidekoper v. Douglass*, Ib. 392; *Ross v. Barker*, 5 Watts, 392; *Barnes v. Irvine*, Ib. 497; *Burchfield v. McCauley*, 3 Watts, 1.
(2) Ib. 110, 11.

(3) 1 N. J. L. 1, 2. 235.

(4) 1 N. J. L. 166, 7, 8. (See Ib. 9, 17; *Lippincott v. Souder*, 3 Halst. 161;) *Dela. St.* 1843, 454, 6; See *Tubbs v. Lynch*, 4 *Harring.* 521.

(a) By the same statute, an owner in fee may alienate, subject to the same services which he himself owes to the chief lord, if any; or a part of the lands, subject to proportional services. The feudal exactions are abolished, tenures converted into socage, and past alienations placed on the same footing. But rents and socage services are not discharged.

(b) A patent from the State may be presumed, on proof of a warrant 103 years old, located 67 years ago, and a possession of 88 years. *Walls v. McGee*, 4 *Harring.* 108.

So, a grant from the State may be presumed on an interrupted possession of 50 or 60 years. *Tubbs v. Lynch*, 4 *Harring.* 521.

the land law, from the numerous decisions to be found in the earlier reports, a few of which I subjoin. A large part of them relate to minute questions of boundary; and many others to the titles of *escheated* lands, obtained under *escheat warrants*. The mode of trial in ejectment by *plats*, has also given rise to many nice questions.(1)

185. In this State, by a late act, where land is taken up under a common or special warrant, or warrant of resurvey; 20 years' possession gives a good title against a patent from the State, issued on such warrant. But this is not to affect any warrant, &c., prior to the act. (1818)(2)

186. The proprietary held the dominion of Maryland and property of the soil, which he could dispose of like any other owner; and a party, upon acquiring an equitable interest by a warrant, return of survey, and payment of composition money, could compel a grant from the proprietary.(3)

187. The Lord Proprietary could not be affected by any adverse possession of land previous to a grant.(4)

188. As between the holders of general or common land warrants, there is no priority of right to locate. This warrant is a mere authority to the surveyor, &c., to make the survey, and the certificate is the inception of title, to which the patent, when issued, *relates*. The title remains in the State until *location*, and passes by a junior warrant, if first executed.(5)

189. A person, having made a survey of land, obtained a certificate thereof, and paid the composition money, devised the land; and it was held by himself and the devisees, about 74 years. A grant was actually made to him after his death. Held, this grant was wholly void, and that a legal grant should be presumed from the circumstances.(6)(a)

- (1) See *Rogers v. Raborg*, 2 Gill & J. 54; *Shilknecht v. Eastburn*, Ib. 114; *Thomas v. Godfrey*, 3, 142; *Wall v. Forbes*, 1 Har. & G. 441; *Coursey v. Helmsley*, 3 Bland, 458; *Ross v. Bladen*, Ib. 464; *Hughlett*, Ib. 475; *Wampler v. Shipley*, Ib. 183; *Railroad v. Hays*, 2, 259; *Norwood v. Norwood*, Ib. 475; *Andrews v. Scotton*, Ib. 632; *Crawford v. Berry*, 11 Gill & J. 310; *St. 1842*, ch. 108; *Wilson v. Inloes*, 6 Gill, 121; *Buckingham v. Dorsey*, 1 Md. Ch. 31. By the Declaration of Rights, (29, sec. 33.) churches, glebes and other property of the Church of England, shall remain such forever. Gifts, devises, &c., for support of a minister, &c., without leave of the legislature, are made void, unless two acres are appropriated for a church and burial-ground. Ib. sec. 34.
- (2) Md. L. 1818, ch. 90. (See 1822, 128; 1827, 201.)
- (3) *Howard v. Moale*, 2 Har. & J. 249. See *Bordley*, 2 Bland, 62.
- (4) *Steuart v. Mason*, 3 Har. & J. 531.
- (5) *Canal, &c. v. Railroad, &c.*, 4 Gill & J. 1.
- (6) *Carroll v. Norwood*, 5 Har. & J. 155; *Hall v. Gough*, Ib. 120.)

(a) An imperfect title in the land office is a chattel, and, as such, liable to execution. *Coombs v. Jordan*, 3 Bland, 303.

A party, who obtains a warrant of survey, is presumed to have notice of a prior location, and is chargeable with fraud for obtaining a patent by misrepresentation, for which a court of equity will set aside the patent. *Hoy v. Johnston*, 2 Gill, 391.

A grant, though for the most part covered with water, still passes to the grantee all the soil under the water, included within its outlines, subject only to the rights of the public as to fishing and navigation; and, if encroached on, by driving of piles, and erecting a house or building a wharf thereon, the grantee may maintain trespass or ejectment. *Casey v. Inloes*, 1 Gill, 430.

The death of a patentee will not be presumed, in order to support a title to land, acquired in violation of law and the rules of the land office. *Lee v. Hoye*, 1 Gill, 188.

If a tract of land call to begin at a bounded tree by the side of a branch, and to run the course and distance to a known boundary, and the beginning tree be lost; the commencement of the first line of the tract must be found, by reversing the course and distance from the known boundary, and the line to the branch not elongated or shortened; the expres-

190. In Virginia,^(a) the price fixed for public lands is \$2 for 100 acres, to be paid in specie, auditor's warrants, or audited certificates. Payment is made to the *treasurer*, upon whose receipt the auditor gives a certificate. This is lodged in the land office, and the *register* issues a warrant, authorizing the surveyor to survey. There shall be no warrant for lands vested in the State, for non-payment of taxes, or grant of unappropriated lands on the Chesapeake Bay, the sea shore, or that of a public river or creek. A warrant not located is personal estate; from entry, till regularly withdrawn or vacated, it is real estate. The register may deliver the original grant to the bearer of his receipt for a survey, on which the grant is founded. If there is no surveyor, entry

sion as to the branch being merely descriptive of the general locality of the tree, and not an imperative call, locating the spot where the tree stood. So, although by the reversal of the line, the beginning is shown to be in deep, navigable water, at a great distance from the shore, or where the lost beginning could not have stood. *Wilson v. Inloes*, 6 Gill, 121.

The leading object in the gratification of all calls, is certainty in the location. *Ib.*

In general, if there be a peremptory call to an object of length by a course and distance line, and the object can be reached by gratifying the distance, but violating the course, or by conforming to the course and disregarding the distance; the course must control the distance. *Ib.*

The word "by," when descriptively used in a grant, does not mean "in immediate contact with," but "near" to the object; and "near" is a relative term, meaning, very unequal and different distances. *Ib.*

The reason assigned, for running lines of lands to the boundaries called for at their terminations, instead of terminating them according to their courses and distances, is not exclusively, that greater certainty as to the *termini* of such lines is thereby attained; but also, because thus locating grants is more beneficial to grantees; and it is a rule of construction in grants, to give them that interpretation, which operates most strongly against grantors, and in favor of the grantees. *Ib.*

A deed or patent passes nothing, unless the land described is susceptible of location, or, in other words, unless the survey thereof can be made to close, either as to the whole conveyed, or some definite part thereof. *Ib.*

If land be granted by boundaries only, without courses and distances, and the beginning or any subsequent boundary be lost, and its original *situs* cannot be proved, the entire tract is lost, and the grant becomes inoperative.

If a tract be granted by courses and distances only, without calling for any boundary or object, save that at the commencement of the first line, and it be lost, and no proof can be adduced of the beginning or ending of any of its lines; the tract becomes a nonentity, and the grant a nullity. *Ib.*

If a grant be made, not only with courses and distances, but with calls, it has a principle of self-sustentation, not possessed by grants with course and distance only, or with calls only. *Ib.*

Where a grant is by course and distance and calls, if the beginning, and any or all of the boundaries, save one, are lost and incapable of proof, the vitality of the grant still continues. This is the natural import of the express words of the grant. *Ib.*

A valid survey or grant may be made, without stating any natural object as the beginning of its first line, if there be a boundary at the termination thereof. *Ib.*

It is no objection to a grant, that the place of its beginning is covered with water, whether navigable or otherwise; or that any of its lines run across such water. *Ib.*

In cases of grants of land, describing it by courses and distances and calls, the courts of Maryland have determined that, in locating them, they shall first be run by the calls; but if that be impracticable, then by course and distance. *Ib.*

Where, in an action of trespass *quare clausum*, a warrant of resurvey was ordered, and a plat of the land was executed, and, with the explanations thereof, was offered in evidence, setting forth only that the letter A, on the plat, showed where the defendant had timber cut, and was the trespass complained of by the plaintiff; held, the plaintiff could not prove by the surveyor, that certain stars, at other and distant places upon the plat, not mentioned in the explanations, represented the stumps of trees, which the defendant had once admitted to the surveyor, previously to the survey, to have been cut by him. *Funk v. Hughes*, 5 Gill, 315.

(a) Before the year 1783, Virginia owned the territory, since formed into the States of Ohio, Indiana and Illinois. By an act of cession and deed of that date, she granted away all the territory north-west of the Ohio River, excepting certain reservations. *Henthorn v. Doe*, 1 Blackf. 160.

may be made with the clerk of the county court. One having a warrant, and wishing to locate it, may lodge it with the chief surveyor of the county, designating it precisely. Preference is given to the warrant earliest dated; if dated on the same day, decision is made by lot. Entries are void, unless surveyed within two years from date. There shall be no location except in the county where it is first made. If part of a warrant is unappropriated, the holder may have an *exchange* warrant for such part. There shall be a survey, and an indorsement stating how much is unappropriated. If the whole is appropriated, it accompanies the last survey made by virtue thereof. Where there has been no entry or location upon a warrant issued on or before February 2, 1804, the holder may exchange it. A surveyor shall not within twelve months issue a certificate, copy or plat, except to his employer, unless a *caveat* to a grant has been issued. A surveyor shall not admit an entry without a warrant from the register. Nor shall he leave open lines, but bound by marked trees, unless there is a water-course, or an ancient marked line. The breadth of each survey shall be at least one-third of its length in every part, unless bounded on both sides by barren mountains, water-courses, or the bounds of appropriated lands. The holder of a plat and certificate shall return it within twelve months to the land office; otherwise, or where the breadth is not sufficient, any one may enter a *caveat* against a grant. So one having a better title may enter a *caveat*; but if he does not, he may still assert his right by suit. The register shall not receive a plat, &c., plainly interfering with others, and dated since January 1, 1796, but such surveys are void. Entry upon a location is invalid, where land has been settled thirty years, and quit-rents or taxes paid. In such case, the State right is lost. But this is not to affect any entry, &c., prior to January 24, 1798, nor lands forfeited for taxes, nor to change the statute of limitations. The party prevailing upon a *caveat* may have a grant. Aliens may transfer warrants or certificates. They may also purchase, and have two years from return of the survey, to become citizens, or transfer their right. A land warrant, subsequent to February 1, 1809, shall be assigned by indorsement, attested by two or more witnesses. If prior, in case of any other assignment, and upon affidavit of the applicant, he may have a new warrant. (The form of a grant is prescribed, and it shall be recorded.) The proprietor of highlands, adjoining swamps, marshes or sunken grounds, if under disability, is allowed the right of pre-emption three years from its removal. No person shall enter, survey or take up land held as surplus in a patent or grant, after the death or alienation of the grantee, &c., nor without one year's notice to him, after which, unless the patentee obtain a new patent, the applicant may have a resurvey, and obtain a patent for the surplus land, as unappropriated. But the former patentee has his election to assign the land in any part of the tract, in one piece, the breadth to be at least one-third of the length, five acres per 100 to be allowed the first patentee for variation of instruments. If the application fails, the applicant incurs costs; and if vexatious, subjects himself to an action. Where an owner of land finds his description to be uncertain, or has adjoining lands, or locations or entries adjoining tracts of lands, and wishes to have them included in one grant, he may ob-

tain a resurvey by application to court, and a new grant, unless a *caveat* interpose.(1)

191. In this State it is held, that reasonable strictness is necessary in an entry for lands.(2)

192. Entry of "400 acres on the south branch of the Potowmac, adjoining Lord Fairfax's land at the mouth of Mill Creek," (which was on the west side of the river.) Held, this included no land on the east side.(3)

193. An entry is not a legal title, but only the first step towards it.

194. So a warrant is a mere inception of title, to which the grant *relates*, but not to the prejudice of fair and legal intervening rights.(4)

195. A location and grant have precedence of a prior entry and survey, where the prior entry does not include the lands surveyed. But a title under a warrant is not affected by the survey's containing more land than the warrant authorized.(5)

196. No entry can be made under a warrant, exhausted by prior entries.(6)

197. What is reasonable time for a warrantee to complete his title depends on the circumstances of each case. But where a warrantee delayed for 13 years from the survey to tender the composition money, &c., and 11 years after the survey another person had the land surveyed, and after tender by the former obtained a grant; held, equity would not relieve the former warrantee.(7)

198. Land occupied under a patent and settlement, is not subject to a treasury warrant, as waste and unappropriated.(8)

199. Land held by entry and survey is real estate, and passes to heirs.(9)

200. Warrants and surveys are assignable, but not entries.(10)

201. A patent, granted by one State, is a public act, entitled to "full faith and credit," in every other. Hence, its validity cannot be collaterally disputed in another State, upon the ground that the survey was a forgery.(11)

202. Patent for a tract, containing 70,202 acres, with specific bounds. The survey contained a surplus of 42,000 acres, held by rights prior to those upon which the patent was founded. These titles were reserved in general terms. Held, the patentee might recover in ejectment all the lands within the bounds mentioned, except such as the defendant could show to be included in the reservation.(12)

203. An entry may be offered as presumptive evidence, to identify the calls of a patent: but not to supply points of description not found in the grant, or to impair or aid the legal title founded thereupon.(13)

204. A patent for lands covered by a prior claim does not pass a title to the patentee, subject only to such claim. But if the latter is a mere entry, which fails to take effect by neglect to survey, and return the plat, the land is open to a warrant in favor of any third person.(14)

(1) 1 Vir. Rev. C. 322-36. See St. 1840, 22, 169.

(2) *Hunter v. Hall*, 1 Call, 206.

(3) *Ib.*

(4) *Johnson v. Brown*, 3 Call, 259; *Pickett v. Dowdall*, 2 Wash. 106.

(5) *Ib.*; *Johnson v. Buffington*, 2 Wash. 116.

(6) *Preston v. Harvey*, 3 Call, 495.

(7) *Curry v. Burns*, 2 Wash. 121.

(8) *Norvell v. Camm*, 2 Munf. 257.

(9) *Morrison v. Campbell*, 2 Rand. 206.

(10) *Ib.*

(11) *Lassly v. Fontaine*, 4 Hen. & M. 146.

(12) *Hopkins v. Ward*, 6 Munf. 38.

(13) *Camden v. Haskill*, 3 Rand. 462.

(14) *Nichols v. Covey*, 4 Raud. 365.

205. The purchase of a warrant, and a consequent entry, is no purchase of the land, until a grant is obtained.(1)

206. Before the revolution, waste lands were generally taken up by order of council, and by warrant from the governor, for military services. An entry in the council books, followed by an order of council, gave priority of grant.(2)

207. The old claims of the crown, by the treaty of 1763, extended to the Mississippi. And upon extinguishment of the Indian title the land vested in the grantees from the crown, and was not subject to new grant as waste land. But lands not previously appropriated, were subject to location by treasury warrants.(3)

208. A court of equity will not entertain a bill, to repeal a patent, filed more than 10 years after the patent was issued.(4)

209. The court has jurisdiction to set aside a patent, obtained with knowledge of a prior entry.(5)

210. A tenant in ejectment, claiming under a junior patent, founded on an inclusive survey, may, to show possession under color of title prior to his patent, introduce in evidence the entries for the different tracts embraced in the inclusive survey, the order of the court authorizing the survey, and the survey itself, it being immaterial whether an adversary possession under a claim of title be under a good or a bad, a legal or an equitable title.(6)

211. Although there can be no adversary possession against the Commonwealth, and, therefore, a junior patentee cannot go behind the elder patent for the purpose of giving color to his possession prior thereto, yet a junior patentee may go behind his own patent, and also behind the elder patent, for the purpose of giving color to his possession from, or subsequently to, the granting of the elder patent.(7)

212. A *caveat* is a kind of equitable process, resembling an injunction, and subject to equitable rules.(8)

213. The effect of a *caveat* is to prevent, not to set aside a patent. But, pending a *caveat*, equity may repeal a patent surreptitiously obtained. It is said, equity will not interfere, upon grounds which were or might have been offered upon trial of a *caveat*. But it will entertain jurisdiction, if circumstances are shown which render it proper, though a *caveat* is the regular remedy. Thus, where the rights of the parties cannot be adjusted in the court of *caveat*, but the aid of equity is needed to give each his proper share of the land, for which one has improperly obtained a patent.(9)

214. A *caveator* must prove a title to the land warrant, under which his own survey is made.(10)

215. A patent will not be set aside, upon the ground of an equity which would have given a better title upon a *caveat* prior to the grant, unless the plaintiff was prevented by fraud or accident from prosecuting a *caveat*.(11)

(1) *Ib.*

(2) *Loyal, &c.*, 4 Call, 21.

(3) *Marshall v. Clark*, 4 Call, 268.

(4) *Goodwin v. McCluer*, 3 Gratt. 291.

(5) *Hagan v. Wardens*, 3 Gratt. 315.

(6) *Shanks v. Lancaster*, 5 Gratt. 110.

(7) *Ib.*

(8) *Preston v. Harvey*, 3 Call, 495.

(9) *Wilcox v. Calloway*, 1 Wash. 38; No-

land *v. Cromwell*, 4 Munf. 155; *Depew v. Howard*, 1 Munf. 293; *Christian v. Christian*, 6 Munf. 534. (See *Gooseman v. Martin*, 4 Munf. 533; *Johnson v. Brown*, 3 Call, 259; *Lyne v. Jackson*, 1 Rand. 114.)

(10) *Currie v. Martin*, 3 Call, 28.

(11) *Johnson v. Brown*, 3 Call, 259. (But see 1 Rev. C. 330)

216. Where a will directs the sale of lands, an administrator *cum testa. annex*, in possession, may by *caveat* prevent the issuing of a patent therefor.(1)

217. Nothing but fraud in acquiring a legal title, or an omission to bring a *caveat* through fraud, accident or mistake, furnishes ground for relief in equity, after a grant in favor of one having a prior equity. By *actual fraud*, in such case, is meant actual notice by the patentee of the prior equity.(2)

218. One who can *caveat* ought to do so; but circumstances may excuse it.(3)

219. Where a *caveator* relies upon an *exception*, he must prove the lands in question to be within it.(4)

220. In North Carolina, no entry is allowed for lands west of the line between the State and the Cherokee nation, nor for lands covered by lakes, though hereafter they may become dry; nor for marsh and swamp lands, exceeding 50 acres in one body. But a subsequent clause provides, that an entry may be made for marsh or swamp, where any one marsh, &c., does not exceed 2,000 acres; except such as have been surveyed by the State with a view to draining and reclaiming them. Five cents per acre is the price fixed for entry; or, where one person enters more than 100 acres in one survey, or in one year, ten cents. Payment shall be made by December 31, in the second year after the entry; otherwise, the land reverts to the State; or a subsequent enterer may obtain a grant. The original enterer shall not re-enter the lands within twelve months from the lapse of his entry by non-payment. A claimant of land produces to the entry-taker a description of the land by its bounds and prominent objects; and receives from him a copy of the entry, with its number and date, and a warrant to the surveyor. The surveyor makes out two plats, to be returned within twelve months; one to be filed, and the other, with the warrant, annexed to the grant. Surveys are to be according to priority of entry; and a grant to a subsequent enterer is invalid, unless it be for the surplus land which remains after the survey of the prior enterer. Grants are issued by the Secretary of State, and are to be recorded (or a certified copy from the Secretary's office) in the county registry. If an enterer dies before grant, it may issue in his name, and enure to the benefit of all parties claiming under him. Mistakes in surveys, &c., may be rectified by application to court. Patents illegally issued may be vacated in the same way, upon *scire facias* brought by any other patentee. The judgment to be recorded in the Secretary's office. The State may also repeal a patent illegally obtained, by an equity process instituted by the attorney-general.(5)

221. The first patent or grant gives the best title, not the first entry in the land office, unless the first patentee or grantee loses that title by suffering an adverse possession of seven years, without entry, claim or action. And it has been held, that the first grant passes the legal title, whether there was any entry or not. In such case, an adverse claimant might perhaps have relief in equity.(6)

(1) Archer v. Saddler, 2 Hen & M. 370.

(2) McClung v. Hughes, 5 Rand. 453; Jackson v. McGavock, Ib. 509.

(3) Hamilton v. Maze, 4 Call, 196.

(4) Marshall v. Clark, Ib. 268.

(5) 1 N. C. Rev. St. 249-56.

(6) Seekright v. Bogen, 1 Hayw. 177; Dickey v. Hoodenpile, Ib. 359; Den v. Mooney, 1 Mur. 401.

222. Where a party has proved by his own oath the destruction of his patent, he will not be allowed in the same way to prove that a plat and a certificate of survey produced was annexed to such patent. As there is a counterpart of all the old patents and plats lodged in the Secretary's office, the title should be proved by the production of such counterpart.(1)

223. Rocks in a river, above the surface of the water, have been held vacant property, and subject to the entry laws. But lands under navigable waters were held not subject to entry under the entry law of 1777.(2)

224. The important and conclusive effect given by the statute in relation to processioning, whereby two inquisitions of the processioner vest an absolute title, requires the court to view the proceedings with a vigilant eye, that no injury may accrue from tolerating an undue laxity.(3)

225. A report of a processioner is radically defective, which does not state with precision the claims of the respective parties, so as to show what lines were disputed, or how far they were disputed.(4)

226. Where two patents lap, and one of the patentees occupies a portion of the land contained in both grants, it is a possession of the whole.(5)

227. On a petition to vacate a junior grant by several persons, of whom one only has any existing title, the misjoinder is no bar to a judgment.(6)

228. The relators have a right to this remedy, whether they prove any actual damage or not, the subsequent grant being *per se* a cloud upon the owner's title.(7)

229. Parties claiming under a junior grant cannot impeach an elder one directly ; much less, collaterally.(8)

230. A payment of money into the public treasury, for an entry of land, without the certificate required from the Secretary of State by Rev. Sts. c. 42, sec. 22, is a merely voluntary and unauthorized act, and not a payment on the entry, so as to entitle the party to a grant.(9)

231. The proviso in the act of 1842, c. 35, saving the rights of junior entries "for which the purchase-money may have been paid," is to be construed as not preferring a lapsed entry before a junior entry, subsisting at the passing of the act, on which the purchase-money was afterwards duly paid, and a grant obtained in due time.(10)

232. A made an entry so vague in its description that no one could tell what land it covered. Afterwards B made an entry, definite in its description. A, having full notice of this entry, caused a survey to be made of his entry, by which he included the land entered by B, but to do so, he was obliged to run two miles in length, and but a few yards in width, and pass over several granted lands, and upon such survey obtained a grant before B obtained his. Held, that, under these circumstances, A was to be looked upon in the same light as a junior enterer, with notice of a prior entry of B ; that B's title was preferable ;

(1) Seekright v. Bogan, 1 Hayw. 178, note.

(2) Jones v. Jones, 1 Hay. 491 ; Tatum v. Sawyer, 2 Hawks, 226.

(3) Hoyle v. Wilson, 7 Ired. 466.

(4) Ib.

(5) Williams v. Miller, 7 Iredell, 186.

(6) Holland v. Crow, 12 Ired. 275.

(7) Ib.

(8) Ib.

(9) Buchanan v. Fitzgerald, 6 Ired. Eq. 121.

(10) Ib.

and that he had a right to a decree compelling A to make him a conveyance, and for profits, &c.(1)

233. Where B made an entry of land, prior to a conflicting entry made by A, and, before B discovered that the land he entered, including a rock quarry, was vacant, he had agreed to purchase part of a tract of land which A claimed, and which was supposed to include the rock quarry, but in the agreement the rock quarry was reserved to A; it was held, that this formed no reason in equity why B should not enter the rock quarry, when he found it to be vacant.(2)

234. There being no statute, in North Carolina, prescribing the time within which grants must be issued, where the entry money has been paid, a person who pays the entry money may take out his grant when he chooses, subject to this risk, that, if another person enters the same land without notice of the prior entry, and first obtains his grant, this shall be preferred.(3)

235. One who makes an entry, and has it surveyed, cannot afterwards shift its location, to the detriment of a subsequent enterer.(4)

236. Where one makes an entry so vague as not to identify the land, such entry does not amount to notice, and does not give any priority of right, as against another individual, who makes an entry, has it surveyed, and takes out a grant.(5)(a)

237. In South Carolina, by Statute of 1784, public lands were authorized to be granted and sold for £10 (by act of 1785, 10 dollars) per 100 acres. Provision was made for grants to those who had located lands on or before January 1, 1775, upon warrants of survey, and had failed to obtain grants. A commissioner of locations was provided for, to receive entries and issue warrants of survey thereupon, the latter, with a plat, to be returned to the surveyor-general, and recorded. Upon receiving from him a plat of the land, the Secretary of State to issue a grant, the same to be recorded in his office. The grant to be withheld in case of any fraud. Lands upon navigable creeks or rivers to be laid off, by measuring four chains back therefrom, for every one fronting on and bounded by the same. Surveys of land lying beyond the Indian boundary declared void. By act of 1785, land granted was not subject to be alienated by, or taken for the debts of the grantee, until paid for; and, unless paid for in 12 months, it was to be sold at auction. (See below, act of 1787.) The surplus proceeds, after paying the price and expenses, to be paid to the first grantee *in indents*. If the grantee should have an account in the auditor's office, equal to the amount due, the above sale to be suspended. Where no grant is obtained for six months from return of the survey, (or from the survey,) a grant to be made to any party applying; but a grant within six

(1) *Allen v. Gilreath*, 6 Ired. Eq. 252.

(2) *Ib.*

(3) *Krous v. Long*, 6 Ired. Eq. 259.

(4) *Munroe v. McCormick*, 6 Ired. Eq. 85.

(5) *Ib.*

(a) See further, N. C. Term R. 181; 3 Dev. 59; 4, 596, 419; 1 Dev. & Bat. 369, 210; Hoyt v. Rich, 4, 533; Waugh v. Richardson, 8 Ired. 470; Dula v. McGhee, 12 Ired. 332. It is held, that under the act of 1794, a grant for over six hundred and forty acres was valid. *Wendenhall v. Cassels*, 3 Dev. & B. 49. By a late act (1844-5, 61,) all persons who have made entries and paid for them since Jan. 1, 1840, shall be allowed to Jan. 1, 1847, to receive grants. So, also, those who have not paid. But the act is not to affect other grants, or junior enterers, or swamps in the easterly part of the State.

months, except to the warrantee, to be void. By act of 1786, upon failure of the warrantee to pass the survey through the location office for six months from the survey, the commissioners of locations to certify such survey for any applicant, who may pay the fees. By act of 1787, certain officers connected with the public lands forbidden to purchase them, under penalty of £5,000, removal, and perpetual incapacity. Grants of lands included in former plats and grants, or *surplus lands*, unless made to the former grantees, declared void. Grants to be forfeited unless the purchase-money be paid in six months. Possession for five years previous to July 4, 1776, to give a title, and subsequent grants to be void. By act of 1791, lands to be granted, merely upon payment of the office fees. Lands previously granted, but not actually taken, to be conveyed on payment of 4s. 8d., specie, or paper medium, per 100 acres. If not taken in 12 months, to be sold at auction. (By act of 1792, extended 12 months longer, and by act of 1794 till December 15, next.) Where payments have been made without particular application to one or more tracts, the commissioners to sell such as they may think proper. By act of 1794, (*to prevent speculation and land jobbing*,) no person to obtain for four years, more than one warrant, or grant, nor for more than 500 acres. Prior grantees, (or other persons interested,) authorized to bring trespass against subsequent grantees of the same land. Grants made since the act of 1791, (which authorized further indulgence to prior delinquent grantees,) of large tracts of land, *which have not been elapsed*, and not noticing them in the plats; declared to have been obtained fraudulently, and with notice of the title of such prior grantees, who had actually settled; and the court authorized, upon proof that such latter grants contain *settlements made under former surveys*, to declare them void. By act of 1797, where surveys were made and returned previous to January 1, 1792, not exceeding 640 acres, grants may be issued; the State not to warrant the title, or refund the purchase-money; the applicant to make oath that he is to be the real purchaser; or that the land has been for one year partly cultivated; and that no person's name has been borrowed for obtaining the lands. By act of 1805, grants confirmed, though wanting the great seal of the State; and future grants directed to be sealed with the small seal.(1)

238. An elder grant shall always prevail. It can be set aside, upon a *caveat*, by a subsequent grantee, after it has received the great seal.(2)

239. A reservation of lands for a town, for the use of the inhabitants, is a covenant by the State, that it shall be appropriated to no other use, and makes the State a trustee for the inhabitants. Hence a subsequent grant to an individual must be founded in fraud, or obtained by false suggestions.(3)

240. A grant upon a junior survey, taken out within the time allowed for an elder warrantee to obtain his grant, is void.(4)

241. After a hearing upon a *caveat*, a court of law will not inquire into the priority of title previous to the grant.(5)

242. The following rules are laid down for locating lands and set-

(1) 2 Brev. Dig. 2-13. See *McColman v. Wilkes*, 3 Strobb. 465; *Owens v. Goode*, Ib. 474, n.; *Faulkenberry v. Truesdell*, 5, 221.

(2) *Muse v. Laughridge*, 2 Bay, 426.

(3) *Hawkins v. Arthur*, 2 Bay, 195.

(4) Ib. 558.

(5) Ib. 426; *Mounce v. Ingraham*, Ib. 454.

ting boundaries, though subject to some exceptions. 1. The actual marked corners, stations and lines shall be preserved, consistently with courses and distances. If they disagree, the former shall prevail. 2. Natural and artificial boundaries shall be preserved, unless controlled by more conclusive evidences of location. 3. In the absence of these, courses and distances control. 4. Intervening natural marks shall be preserved, if possible, if designated by rule, and not otherwise controlled.(1)

243. Course and distance will control natural marks or boundaries, when the latter are evidently inserted by mistake, or without regard to rule, or where they do not exist, or are too distant from other marks, to be reasonably presumed.(2)

244. As the State cannot be disseized, it cannot maintain trespass to try titles. For a trespass on public lands, the remedy is by information for intrusion, brought by the public prosecutor, and a bench warrant founded thereupon.(3)

245. Where a grant for a large tract covers several smaller lots previously granted, but not noticed in the latter grant or plat; such grant is not void, but only voidable by the State, or by parties interested.(4)

246. Islands in a river pass by a grant of "all lands within two miles of said river," the grant being made to a company for improving the navigation.(5)

247. Lands recently purchased by the State, from a corporation to whom they were formerly granted, are not *vacant lands*. Hence a grantee acquires no good title to them.(6)

248. In Georgia, grants to deceased grantees are made valid. Also, those to married women. Judgment creditors, or attaching creditors, of persons who have drawn lands in a lottery, may, for want of other property, take out grants of such lands, and subject them to legal process. By act of 1777, lands were to be granted, on condition that the grantees should settle, cultivate and occupy, within six months, or as early as practicable, if disturbed by any enemy. Preference shall be given to those who have previously had allotments, and continued in the State, and settlers on lands not heretofore allotted or granted. If a grantee leaves the land within five years, an assignment of his grant becomes void, and the land may be regranted, upon proof of his having left the State. The form of surveys regulated; substantially the same as in Virginia, &c. 100 acres of land to be granted to the builder of a grist-mill; 500 to the builder of a saw-mill; and 2,000 to the builder of iron works, who shall work them for five years. By act of 1780, any person, bringing his family into the State, is made entitled to a grant of 200 acres for himself, and 50 for each member of his family. Any person giving security for the erection of iron works, to be entitled to a grant of 2,000 acres for a forge, 2,000 for a bloomery, and 2,000 for a furnace. Grants to issue, notwithstanding the loss of warrants and returns. Warrants, &c., for lands within the Indian lines declared void; also grants surreptitiously obtained. By act of 1783, any master

(1) 2 Con. 115; Sumter v. Bracey, 2 Bay, 515; Colclough v. Richardson, 1 McCord, 167; Welch v. Philips, Ib. 215; 2 Bai 78.

(2) 1 McCord. 167, 215; Nelson v. Frier-son, Ib. 232; Stokes v. Holliday, 255; Bond v. Quattlebaum, 584.

(3) State v. Arledge, 1 Bai. 551; 2, 401.

(4) Huggins v. Brewer, 2 Bai. 25.

(5) McMullen v. McCulloch, 2 Bai. 346.

(6) State v. Arledge, 2 Bai. 401.

of a family to have 200 acres as his own *head right*, and 50 for each of his family, paying for the latter a small consideration. The grant not to exceed 1,000 acres, and to be made on condition of 12 months' previous cultivation, of three acres per 100; otherwise, the party to have no power of disposing of the land, except by will. In default of payment of the purchase-money within 12 months from date of the warrant, the land to be deemed lapsed, and subject to a new grant. A grant to be withheld in case of *caveat*. The mode of proceeding upon *caveats* prescribed. Warrants to be granted by the justices of each county, upon oath of the applicant, showing himself entitled. The warrants to describe the boundaries of the land, as nearly as practicable, and not to cover lands previously taken up. Grants to issue upon past warrants. Also, to persons who have settled in the State conformably to a proclamation of 1778, and fixed some mark of possession upon vacant tracts. Surveys beyond the Indian line declared void. By act of 1784, sales to settlers of lands in two new counties regulated, for the price of 3s. per acre, to be secured by mortgage. Inhabitants of Virginia to have *warrants of reserve*, agreeably to an act ordering a reservation of 200,000 acres for their benefit. 20,000 acres in each county to be laid off for a college. Citizens of other States, making oath of their intention to become inhabitants, to have warrants for not more than 1,000 acres, on reserve for 12 months. The warrants to be void, upon failure of settlement within that time. The governor, &c., to issue grants, and hear *caveats*. (By act of 1789, the governor alone.) By act of 1785, no person to obtain a grant, &c., except for himself and his family. Three acres per 100 to be cultivated in 18 months; otherwise, the land subject to a treble tax. A survey interfering with a prior one to be void. In case of two grants for the same land, the prior survey to have preference, so far as to give the party holding it an action for damages against the other, and subject the land to be taken in execution. By act of 1786, the recording of grants within 12 months in the surveyor's office dispensed with. No warrant to be out of date, if surveyed within two years from date. By act of 1787, surveys and grants of the Indian lands declared void. By act of 1789, the plat of every survey to set forth the beginning corner thereof. By act of 1815, provision made for resurveys, where grants have been made and recorded, but the *plats* are not recorded. By act of 1818, grants upon *head rights* limited to three years from survey. By act of 1836, jurisdiction of *caveats* taken from the governor, and vested in the courts. By act of 1843, where there have been two grants of the same tract, the governor may correct the error.(1)(a)

249. In Alabama, the governor issues patents for public lands, after

(1) Prince, 213-14, 512, 540; Ga. St. 1843, 73; 1842, 120, 121.

(a) In addition to the acts of Georgia, above imperfectly noticed, there are numerous statutes regulating the disposition of public lands by *lotteries*. These, however, are chiefly *local* as well as *temporary*, in their operation. As to grants by the State to the United States, see *Howard v. Iugersoll*, 13 How. 381. See also *Lamb v. Harris*, 8 Geo. 546.

payment of the price into the treasury. Patents, &c., are recorded by the Secretary of State.(1)(a)

250. In Tennessee, the laws upon this subject are in many respects the same with those of North Carolina. By act of 1799, inhabitants south of French Broad River have the preference to enter by pre-occupancy, if the entries are made within the time prescribed. *Improvement* consists in a house built, land enclosed and cultivated, or part thereof. In case of dispute between occupants, a special jury may be summoned to try the title. The prevailing party, upon presenting a copy of the verdict, obtains a certificate and order of survey; and the purchase-money is re-funded to the other. Where a second claim to lands is made with the *entry taker*, the party gives bond to prosecute such claim. Every survey shall be bounded by *conditional* or natural boundaries, or right lines running east, west, north and south, and shall be an exact square or oblong, or the length not exceeding double the width, unless such lines interfere with previous grants or surveys, or the land lies upon a navigable river, which shall be one bound. No survey to exceed 640 acres. Any improver, making an entry on or before the first Monday in March, 1800, to have a preference, unless there is some other just claim, paying \$25 per 100 acres, not exceeding 640 acres. Entries to be void, unless payment be made within twelve months therefrom.(2) By act of 1806, the State is districted for the sale of public lands, (in pursuance of an act of Congress;) and the lands are divided into sections in substantially the same way (the sections being six miles square, and the lines run north and south) with the lands of the United States. Every survey to be connected, if possible, with some line of a section, and to conform to any spot of notoriety specified in the warrant. Reservations of 640 acres to be made for schools. Provision made for a *lottery* upon a certain day. A party holding a warrant, which he wishes to locate, shall give a specific description of the lands which he has in view. The length not to exceed double the breadth, unless bounded by other claims. In case of several applications at the same time, the priority shall be decided by lot. The surveyor shall deliver a plat and certificate to the party, and record the same. After survey, an adverse claimant may interpose a *caveat* to a grant. If he prevail, he may claim a plat and certificate. Grants shall be recorded by the register.

(1) Aik. Dig. 95, 6; Clay, 158. As to the laws of Mississippi, see Miss. L. 87; Hester v. Kenbrough, 12 S. & M. 659; Grand. &c., v. Bryan, 8, 234; McAfee v. Keirn, 7, 780; Hittuk, &c. v. Watts, Ib. 363. See Bullock v. Wilson, 5 Por. 338; Condiff v. Orms, 7 Por. 58; Rodgers v. Rawlings, 8 Por. 325; Doe v. Hunt, 4 Alab. (N. S.) 129; Mann v. Bissout, 4, 731; Hudson v. Milner 12 Ala. 667; Mitchell v. Cobb, 13, 137; Yarbrough v. Hood, Ib. 176; Wells v. Thompson, Ib. 793; James v. Scott, 9 Ala. 579; Pollard v. Greitt, 8, 930.

(2) 1 Scott, 624, 8. See Graham v. Smith, 1 Humph. 546; Kelly v. Hare, Ib. 163; Chester v. Hubbard, 2, 354; Brown v. Massey, 3, 470; Davis v. Broomfield, 3, 174; Bagnell v. Broderick, 13 Pet. 436.

(a) It is held in this State, that entry and payment give an inchoate title to public lands which is descendible and transferable. Goodlet v. Smithson, 5 Por. 245; Wright v. Swan, 6, 84. Non-payment for lands purchased, under the act of 1800, does not cause a forfeiture of them, till again offered for sale. Rogers v. Rawlings, 8, 325. But where a grant is made, to be forfeited on breach of condition; a breach *ipso facto* causes forfeiture. Kennedy v. McCartney, 4 Port. 141.

Where a party had an equitable title to one-half of a tract of land, of which the line had not been run and ascertained, and was not one of the subdivisions of land known to the land office, a possession, to be noticed, must cover the entire tract claimed. Hanrick v. Thompson, 9 Ala. 409.

When a surveyor has reason to suppose that one holds more land than a survey or grant authorizes, he may resurvey. If the excess is not more than 10 per cent. it shall not be held an error; if it is more, the party may locate it by a new warrant within three months; but, if the excess is more than one-quarter of the whole, the land shall be held *vacant*. In the second case, if the party so elects, he may leave out the overplus where he sees fit, in one tract, by straight lines, run to the cardinal points, as nearly as possible. If he does not, it may be done by the surveyor, and the applicant for a resurvey shall have a preference for the surplus land for three months; if no applicant, or after such time, it may be disposed of to any person. Where a grant falls short of the warrant, the holder may have a new warrant for the deficiency, if amounting to ten per cent. Provision is made for *proceeding* lands, for the purpose of ascertaining their bounds. Also for grants, founded upon entries made under the laws of North Carolina; and for new grants in place of those defeated by better titles, or of those which cannot be located for defective description. A board of commissioners is appointed, to settle claims under warrants, &c. Where one wishes to obtain a title to land, in consequence of a grant of better title covering the land called for in his patent, he shall produce to the commissioners the grant, and the mesne conveyances, if any, under which he claims, together with a certified copy of such better title, and a connected plat of the tracts. Upon proof of such better title, a certificate issues, and is recorded, authorizing a new grant, and the former grant thereby becomes invalid as to the part of the land referred to. A similar certificate issues, where a grantee proves to the commissioners, that for any cause he is unable to identify the land granted. Acts of November, 14, 1801, repealed. Provision made for obtaining grants from the commissioners, upon prior warrants issued by the Secretary of State. No grant to be evidence of a claim, unless previously recorded in the county register's office. Grants from North Carolina, to be void unless recorded before June 1, 1807. Registers to record with the grant the certificate of survey. An act of September 6, 1806, provides for the granting to occupants of lands south of French, Broad and Holstein, and west of Big Pigeon rivers, in pursuance of an Act of Congress. The price to be \$1 per acre; the quantity not to exceed 640 acres; one-tenth of the price to be paid, and then a patent to issue, specifying the amount due; but the party to have no power of transferring the land, except by subjecting it as security for the sum due. The land to be laid off into townships, like United States lands, with reservations for schools. The party to return a plat and certificate of survey on or before the day when the first instalment falls due. No grant to issue to the assignee of a plat and certificate, unless the assignment be made upon the plat, &c., and certified by the surveyor-general. The mode of proceeding upon *caveats* prescribed. Also the mode of settling disputed lines, through a special jury, unless a compromise be made, which shall bind the parties. A summary process provided for collecting purchase-money due.(1)

251. By Statute of 1821, where sales for taxes are made on entries

(1) 1 Scott, 889, 926; Add. Ib. 980; St. 11; 1829, 23, (relating to *occupants*;) 1832, 1821. 49, 32, (terminating grants upon North 40; 1833, 12, 3. Carolina claims;) 1823, 24; 1825, 24; 1826,

and plats and certificates, the purchaser may take out a grant in the name of the original owner.(1)

252. By Statutes of 1823, the survey to be made within 12 months from entry; the plat and certificate returned in six months from survey; and the grant issued in 12 months thereafter. The quantity of land entered limited to 640 acres.(2)

253. By Statute of 1824, no entry shall be made of land occupied or cultivated by another, without previous notice to him. Plats and certificates are made assignable.(3)

254. By Statute of 1832, warrant or certificate holders may obtain grants of vacant land, not interfering with prior occupants. Persons claiming by occupancy, entry, grant or deed, a less quantity of land than 200 acres, may increase it to that amount, not interfering with prior occupants. The provision applies to any reservation or occupancy for the building of mills, or the promotion of public or manufacturing improvements. Entries may be assigned, and the assignee have a grant.(4)

255. By Statute of 1835-6, grants may issue upon lost warrants, upon certain conditions.(5)

256. An entry must be made in a square or oblong, if there be sufficient vacant land; or, if not thus entered, it should be thus surveyed.(6)

257. In order to establish the specialty of an entry, it is not requisite that the object called for be notorious at the time of making such entry, provided it become so before the inception of an adverse claim (7)

258. An entry which calls for natural and artificial objects is special.(8)

259. An elder entry with a younger grant will not prevail over a younger entry with an elder grant, unless the first entry is special in its calls, and conforms to its own grant and survey. If it deviate from the survey, so as to interfere with the junior entry, it is void, though the latter be not surveyed within a year.(9)

260. An entry and survey, though returned after 12 months, give a good title against an entry subsequent to such return. But an entry, not surveyed within 12 months, is void against a subsequent entry. If there be none, and the entry is surveyed according to its calls, and a grant issued, the grant relates to the entry.

261. So an entry, not seasonably surveyed, is good against all subsequent entries, which could be surveyed in a square or oblong.(10)

262. A younger entry, with a prior survey, prevails over an elder entry with a younger survey, though the survey upon the younger entry be not made within 12 months.(11)

263. Where the boundaries of land cannot be found, and a resurvey is had, if this reasonably conform to the calls of the grant, though not strictly correct, the grantee acquires a valid title, by estoppel, against

(1) *Ib.* 48.

(2) *Ib.* 44, 65.

(3) *Ib.* 31.

(4) *Ib.* 42-3-4.

(5) *Ib.* 151. See further, St. 1839-40, 24.

(6) *McGavock v. Shannon*, 5 Yerg. 128;

Mitchell v. Thompson, 1 McLean, 99.

(7) *Talbot v. McGavock*, 1 Yerg. 262.

(8) *Clark v. Hunt*, 5 Yerg. 278.

(9) *Craig v. Miller*, 3 Yerg. 248; *Vaughn v. Brown*, 5 Yerg. 236.

(10) *Rhodes v. Perkins*, 4 Yerg. 170; *Vaughn v. Hatfield*, 5 Yerg. 236; *McGavock v. Shannon*, 5 Yerg. 128.

(11) *Vaughn v. Hatfield*, 5 Yerg. 236.

the State, and any subsequent enterer. The grantee is also *estopped* to dispute the *re-marking*.(1)

264. A grantee may *re-mark* for himself, to confirm his boundary, where the State has neglected to mark the lines. But if he wilfully include vacant lands in his lines, such *re-marking* is fraudulent and void.(2)(a)

265. A promise by A to B, to surrender to B so much of A's grant as was covered by B's entry, is no agreement about boundary, and, if made by parol, cannot be offered in evidence in an ejectment suit.(3)

266. The amendment of the boundaries of a grant, upon petition, is conclusive against subsequent entries, even though incorrect.(4)

267. A grant is conclusive evidence of a survey of the land.(5)

268. An actual survey is evidence of the land granted, though part of the land is not covered by the calls of the grant.(6)

269. A grant may be offered in evidence, though not registered in the county where the land lies.(7)

270. A grantee of lands, covered by the Indian right, takes a good title *as to the State*, subject only to this incumbrance. But an entry and grant, prior to the act of 1823, ch. 49, of lands reserved to the Chickasaws, were held void.

271. So a State grant of lands to which the Cherokee title had not been extinguished.(8)

272. The legislature has a right to pass laws for quieting the possession of occupants and settlers; and such laws will be enforced, unless plainly repugnant to acts of Congress.(9)

273. An occupant gains a *prima facie* title, to the extent of his entry though he cultivate but a small part of the land.(10)(b)

274. The laws, securing to the possessor of lands belonging to the federal government the quiet enjoyment thereof, were valid and proper; but they conferred no title on the occupant, which formed a consideration for a contract; and, when he abandoned the possession, his rights were gone.(11)

275. The owner of 200 acres is not entitled to the preference of entry, under the law authorizing extension entries; and, if an entry be made by such owner, it may be set aside on the legal application of another, entitled by law in other respects to make the entry.(12)

(1) *Garner v. Norris*, 1 Yerg. 62; *Houston v. Pillow*, 1 Yerg. 481; *Davis v. Smith*, Ib. 496.

(2) *Houston v. Pillow*, 1 Yerg. 481.

(3) *Proffit v. Williams*, 1 Yerg. 89.

(4) *Malseley v. Kensinger*, 2 Yerg. 72.

(5) *Garner v. Norris*, 1 Yerg. 62.

(6) Ib.

(7) *Cox v. Bowman*, 2 Yerg. 108.

(8) *Blair v. Pathkiller*, 2 Yerg. 407; *McLemore v. Wright*, 2 Yerg. 326; *Gillespie v. Cunningham*, 2 Humph. 19.

(9) *Pettyjohn v. Akers*, 6 Yerg. 448.

(10) Ib.

(11) *Barnhart v. Neisler*, 6 Humph. 493.

(12) *Lacy v. Anderson*, 6 Humph. 495.

(a) If granted land, not originally marked by the surveyor, or whose marks have become obliterated or obscure, be afterwards marked or re-marked by the owner of the whole or a part, in good faith, and in reasonable conformity with the calls (which are questions for the jury;) the owner, the State and subsequent parties are thereby estopped: the owner from claiming land not included in these lines, and the State from claiming that which is included. *Riggs v. Parker*, 1 Meigs, 43.

(b) With regard to the land laws of Tennessee, I must charge myself with more omissions than in those of any other State. These laws are so exceedingly voluminous, and at the same time so destitute of arrangement, even in collections which purport to embody systematically the whole statutory laws of the State, that I have found myself obliged to select such provisions as seemed to me, perhaps erroneously, the most leading and important.

276. The act of limitations of 1837, c. 1, sec. 11, operating on a quiet possession of three years, confers validity on extension entries, made by persons owning more than 200 acres at the time of such entry.(1)

277. When a location is tendered, including land which the locator may lawfully enter, and land which is not subject to his entry, the entry taker should reject the entire location.(2)

278. The 43d section of the act of 1807, c. 2, gives the enterer the right to the quantity of the land called for by his entry, provided the land was vacant at its date, and could be included by any proper mode of survey; thus, where the surveyor was restricted by prior claims and natural boundaries from running south, east, or west, the number of poles called for, the party was entitled to an extension of his line north, for complement, as such extension was in conformity with the call.(3)

279. The elder entry and younger grant gives title against the elder grant and younger entry. The elder grant, however, prevails against the younger grant and elder survey.(4)

280. To overreach an elder grant founded on a younger entry, the prior entry must be *special*; that is, contain on its face such a definite description of the land, as will enable any person to identify.(5)

281. In Kentucky, the statutes relating to public lands are very numerous, but the larger part of them are either local or temporary. It is provided that any free person, over 18 years old, may improve and settle 400 acres. He thereby becomes entitled to a certificate from court, and a warrant within 12 months, at the rate of \$20 per 100 acres. The warrant shall be located within six months, and the land surveyed within twelve, after which a patent issues. The length not to exceed the breadth of the land more than one-third. Preference is given to the earliest settlers. Two years' residence is necessary before a patent issues, previous to which the party cannot assign. These provisions not to apply to salt licks or springs, or to mines. But a subsequent act provides for the purchase of these on certain terms. Where the lands covered by a warrant have been previously appropriated, the warrantee shall be credited the amount paid, upon other lands. A survey may be made upon certificate. Provision is also made for lost certificates. A grant to one deceased goes to his heirs or devisees.(6)

282. In this State it is held, that a grant gives a right of entry, but not actual seizin. No right of entry accrues, till a grant has issued.(7)

283. As in other States, a patent cannot be avoided by matter *dehors*; except by *scire facias* or other regular proceeding instituted to vacate it. Thus, in ejectment, evidence is not admissible to show, that lands recited as granted under treasury warrants were located upon lands,

(1) Ib.

(2) Ib.

(3) Caldwell v. Watson, 6 Humph. 498.

(4) Donegan v. Taylor, 6 Humph. 501.

(5) Parish v. Cummins, 11 Humph. 297.

(6) Ky. Rev. L. 2, 941-3-5-6-7-50-1-87; Ib. 906, 779; 915-6-7, 921; 1039-40-3, 1436, 998-9, 1000, 1044-8; 1052-3, 1058; Ky. St. 1836-7, 12; (4 Bibb, 385; 1 Mar. 199, 357; 7 Monr. 31;) Johnson v. Greshaw, 5 Dana, 543; McGowan v. Crooks, Ib. 67; Burgess v. Tipton, Ib. 540; Gossom v. Sharp,

7, 142; Ralston v. McClurg, 9 Dana, 338; Redd v. Martin, Ib. 420; Ray v. Barker, 1 B. Monr. 368; Hardin v. Cain, 2, 56; Johnston v. Breckenridge, 2; 302; Gray v. Gray, Ib. 201; Rays v. Woods, Ib. 222; Clarke v. Smith, 13 Pet. 195. Campbell v. Thomas, 9 B. Mon. 82; Dorch v. Thompson, 12 B. Mon. 379; Simon v. Gouge, 12 B. Mon. 156; Salmous v. Webb, Ib. 365; Rountree v. Barton, 8 B. Mon. 627.

(7) Innes v. Crawford, 2 Bibb, 412; 4 Bibb, 554; 1 Mar. 59, 506.

upon which the law forbids their being located, though the fact appearing upon the patent would have vacated it.(1)

284. A grant issued pending a *caveat* is void.(2)

285. Misnomer in a patent may be corrected by reference to the entry and survey; as, where the name in the *habendum* varies from that in the granting clause. But parol evidence is inferior to the entry and survey, and inadmissible.(3)

286. Where an act requires an entry and survey to be made within a limited time, with certain exceptions; an adverse claimant may, either at law or in equity, go behind a patent, and show it to be void, as not conforming to the act, nor within the exceptions.(4)

287. Where there are two grantees of the same land, and the right of the prior one escheats, this vests no title in the second grantee, but the Commonwealth holds the land subject to a regrant. So, where a prior grantee relinquishes the land to the Commonwealth.(5)

288. An entry, survey and patent were made in the name of *heirs*, when it should have been *devisees*. Held, the devisees acquired a title.(6)

289. A statute, forbidding the grant of a certificate to any person under 18, was held to be merely directory. A grant to a person under that age cannot be impeached in ejectment; and he may show the fact, to avoid the statute of limitations.(7)

290. The statute of limitations does not begin to run against a patentee, until the issue of his patent.(8)

291. A patent is the conveyance of the existing rights of the State, and not an assertion by the State of a good title to the whole land patented.(9)

292. Where there is anything uncertain in a grant, the grantee may elect to make it certain; and a description which can be made certain passes the land.(10)

293. Although the land is held under a grant from the State, yet, after 25 years of quiet enjoyment, the title of the tenant is good against an intruder, not claiming under a grant from the State.(11)

294. Where settlers have been invited upon public lands by legislative enactments, they acquire pre-emptive rights, subordinate to the rights of the State; but, if the settler fails to comply with the laws, under which he holds, he forfeits his right to pre-empt, and the land may be appropriated to others; and, if so appropriated, and the grantee does not assert his title, and oust the former settler within twenty years, the settler's title is good by prescription.(12)

295. A brought ejectment for land, which W claimed under a patent, dated in 1845. The tenant claimed to hold, under a survey made in 1789, on a Virginia land office warrant, but the plat and survey had not been returned within the time limited by the various statutes of

(1) Bledsoe v. Wells, 4 Bibb, 329; 4 Monr. 51; 5, 213; 1 Munf. 134.

(2) Sharp v. Curds, 4 Bibb, 547; Davis v. Stafford, 8 B. Mon. 274.

(3) Swan v. Wilson, 1 Marsh. 100; Helm v. Handley, 1 Litt. 219.

(4) Atchley v. Latham, 2 Litt. 362.

(5) Elmendorff v. Carmichael, 3 Litt. 481; Stith v. Hart, 6 Monr. 624. (See Doe v.

Robertson, 11 Wheat. 332; Jones v. Jones, 1 Call. 468.)

(6) Hart v. Young, 3 J. J. Marsh. 414.

(7) Jennings v. Whitaker, 4 Monr. 51.

(8) Ring v. Gray, 6 B. Mon. 368.

(9) Beeler v. Coy, 9 B. Mon. 312.

(10) Armstrong v. Mudd, 10 B. Mon. 144.

(11) Orr v. Hollidays, 9 B. Mon. 59.

(12) Campbell v. Thomas, 9 B. Mon. 82.

Kentucky, where the land was situated. Held, the land was thereby forfeited, and A was entitled to recover under his patent.(1)

296. Where a patent professed to be founded on three warrants from the county court, and on a survey made in 1840; held, under the laws of Kentucky, the word "warrants" must be taken in the sense of the Statute of 1837, and not as records of the county court under the Statute of 1835; and, as the patent under such an interpretation was not declared void by the statute, that it could not be declared void in a collateral proceeding at law.(2)

297. In Ohio,(a) it has been held, that where lands are located and surveyed by an ancestor, and patented to heirs, the heirs take by descent, not by purchase.(3)

298. Land cannot be appropriated without an entry. And where the survey and patent include lands which the entry does not, the land may be entered as vacant, and the patentee, or his representatives, shall be required in equity to convey to the subsequent location.(4)

299. A defective entry may obtain sufficient notoriety, and subsequently becomes a good location-call for another entry. But it cannot itself become valid by subsequent notoriety.(5)

300. Where one obtains a patent as assignee, he is not bound, in a suit, to prove the assignment.(6)

301. An entry originally void, for disproportion between the length and breadth of the land, may be rendered valid by the withdrawal of a portion.(7)

302. A survey made by one officially qualified, according to law, is an indispensable link in the chain of title.(8)

303. An entry is, in fact, a location; and refers to a tract with defined, though unsurveyed boundaries, necessarily having more than two corners.(9)

304. In construing an entry, the intention of the locator is to be regarded.(10)

305. In Missouri, the constitution provides,(11) that the assembly shall not interfere with the primary disposal of the soil by the United States, nor with United States' regulations for securing title to purchasers.(b)

(1) *Whitley v. Bramble*, 9 B. Mon. 143.

(2) *Little v. Bishop*, 9 B. Mon. 240.

(3) *Lessee, &c. v. Swearingen*, 1 Ohio, 102.

(4) *Hastings v. Stephenson*, 2 Ohio, 10.

(5) *McArthur v. Phoebeus*, 2 Ohio, 418;

(1, 163.)

(6) *Ib.*

(7) 2 Ohio, 418.

(8) *Ib.*

(9) *McArthur v. Neville*, 3 Ohio, 183.

(10) *Ib.*

(11) Art 10, sec. 1.

(a) See *Swan*, 940-1; *Harlan v. Thatcher*, 18 Ohio, 48; *Latham v. Oppy*, *Ib.* 104; *Blake v. Davis*, 20 Ohio, 231; *Lessee, &c. v. Campbell*, 17 Ohio, 267; *Groyne v. Niswanger*, 15, 367.

(b) As to the laws of Missouri, see *Huntsucker v. Clark*, 12 Mis. 333; *Page v. Hill*, 11 Mis. 149; *Hart v. Rector*, 13, 497; *Waller v. Von Phul*, 14 Mis. 84; *Lessee v. Price*, 12 How. 59; *Asheley v. Turley*, *Ib.* 430; *McDaniel v. Orton*, 12 Mis. 12.

As to the laws of Michigan, see *Sts.* 1839, 162; 1841, 61; 1842, 8, 163; *Stockton v. Williams*, 1 Dougl. 546; *Scott v. Detroit, &c.*, *Ib.* 119.

Of Arkansas, *Sts.* 1843, 44; 1844, 80, 90, 92; 1840, 60; 1842-3, 42, 73, 115, 159; *Featherson v. Adams*, 5 Eng. 163.

Of Illinois, see *Sts.* 1842-3, 193; 1838-9, 124; *Carson v. Clark*, 1 Scam. 116; *Hutson v. Overturf*, *Ib.* 170; *Roberts v. Garen*, *Ib.* 396; *Blair v. Worley*, *Ib.* 179; *Isaacs v. Steel*, 3, 103; *Bremer v. Manlove*, 3, 339; *Rogers v. Brent*, 5 Gilm. 573; *Kruse v. Swipps*, 11 Illin. 98; *Spellman v. Curtenius*, 12, 409; *Dubois v. McLean*, 4 McL. 486; *Ballance v. For-*

CHAPTER LXXX.

TITLE BY DEED.

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|---|---|
| <ol style="list-style-type: none"> 1. Deed—definition, nature and objects. 6. <i>Deed poll</i> and <i>indenture</i>. 10. Acceptance or disclaimer by a grantee. 18. Parties to a deed, who must be. 19. Joint deed. 21. Execution by attorney, distinction between private and public conveyances. 33. Who may convey by deed—disabilities—corporations, infants, insane persons, <i>femes covert</i>. 50. Who may be grantees. | <ol style="list-style-type: none"> 58. Considerations, whether necessary; whether, if expressed, it is conclusive, &c. 79. Deed—how written. 80. Filling of blanks. 81. Stamp. 82. Formal parts of deed. 88. Must be read. 89. Signing and sealing. 102. Delivery. 131. Delivery to third persons—<i>escrows</i>. 153. Attestation. |
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1. A *deed(a)* is a writing on parchment or paper, sealed and delivered, to prove and testify the agreement of the parties whose deed it is, to

syth, 13 How. 18; Sargeant v. Kellogg, 5 Gilm. 273; Ballance v. McFadden, 12 Illin. 317; Gray v. McFadden, Ib. 324; Ballance v. Tesson, Ib. 326; Rankin v. Curtenius, Ib. 334; McClintock v. Rogers, 11 Illin. 279; Rogers v. Brent, 5 Gilm. 573; Wiggins v. Tusk, 12, 132.

Of Texas, Houston v. Robertson, 2 Texas, 1; — v. Perry, 2 Ib. 37; Horton v. Brown, Ib. 78; Land, &c. v. Ragnet, Ib. 98; Glasscock v. Commissioner, &c., 3, 67; Lockhart v. The Republic, 2 Ib. 127; Bracken v. Wells, 3 Ib. 88; Kemper v. Victoria, 3, 135; Tickner v. The State, 2 Ib. 269; Land, &c. v. Riley, 3, 237; The State v. Mason, Ib. 315; Linn v. The State, Ib. 317; Norton v. Commissioner, Ib. 357; Hart v. Turner, Ib. 374; League v. De Young, Ib. 497; Byers v. James, Ib. 529; Holliman v. Peebles, 1 Tex. 673; Hosmer v. De Young, Ib. 764; Jones v. Menard, 1 Ib. 771; Trimble v. Smithers, Ib. 790; McGimpsey v. Ramsdale, 3, 344; Yates v. Houston, 3, 433; Edwards v. Davis, Ib. 321; Goode v. McQueen, Ib. 241; Republic v. Thorn, 3, 499; Robbins v. Robbins, 3, 496; Stauffer v. Stephenson, Ib. 20; Mayer v. McCullough, Ib. 211.

Of Louisiana, see U. S. v. Moore, 12 How. 209; — v. Le Blanc, Ib. 435; — v. Simon, Ib. 433; — v. Pillerin, 13, 9; Glenn v. U. S., Ib. 250; Vilemont v. U. S., Ib. 261; U. S. v. Porche, 12 How. 426; — v. Castant, 437.

Of Florida, Morse v. Garrason, 4 Flor. 460; Taylor v. Baker, 1 Branch. 245.

Of Mississippi, see Glenn v. Thistle, 23 Miss. 42; Netson v. Sims, Ib. 383; Montgomery v. Ives, 13, 161; Dixon v. Porter, 23 Miss. 84; Nelson v. Sims, Ib. 383.

Of Iowa, Kerr v. Leighton, 2 Greene, 196; Ellis v. Mosier, Ib. 246; Burlerson v. Teeple, Ib. 542.

(a) In connection with this title, it seems proper to refer briefly to the history of the English law, pertaining to the alienation of real estate; although its early provisions upon this subject never made a part of American jurisprudence. It has been said, that, in the time of the Anglo-Saxons, lands were alienable either by deed or will. This principle was probably even then subject to many restrictions; but it was not till after the Norman Conquest, and the establishment of the feudal system, that such burdens were imposed upon its exercise, as, in fact, almost to destroy it, and render the *unalienableness* of real property a settled rule of the common law. The rule was founded in part upon the consideration of favor to the heir; but chiefly upon the *personal* character of the relation between the lord and his vassal, which would become wholly nugatory by a transfer from the latter to a stranger, or perhaps an enemy. The first departure from the strictness of the old law, was in allowing *subinfeudations*; whereby the tenant enfeoffed another, to hold, not of the lord, but of himself, leaving him still liable to the chief lord, upon all the feudal obligations.

With the advancement of civilization and commerce, the restriction upon alienation became more and more opposed to the spirit of the age and public opinion; until the statute *quia emptores*, (18 Edw. I.) finally established the free right of alienation by the sub-vassal, without the lord's consent, and declared, that the grantee should not hold of his immediate feoffor, but of the chief lord of the fee. Subsequent statutes, in the same reign and that of Edw. III, made real estate liable to be taken for debts by the processes of *elegit* and *extant*; and the tendency of legislation and adjudication has ever since been, to place lands, with respect to the right of transfer, on the same footing with personal property.

the things therein contained. It is called *a deed*, in Latin *factum*, because it is the most solemn and authentic act that a man can perform, in the disposal of his property.(1)

2. A term of equivalent meaning to *deed*, is *conveyance*. *Conveyance* is the common statute word, to denote the deed, act or instrument, by which property in real estate is transferred.(2)

3. At common law, a freehold title to land by purchase must be conveyed by deed. So under the statute of uses; but, in general, by statute, a title may be acquired without deed. So an equitable title.(3)(a)

4. It is said, in the ancient books, there are many *dicta* respecting deeds, which in modern cases and decisions have been either neglected or exploded, or so explained as to be rendered consistent with the security of titles and demands depending upon written evidence, and subject at all times to a variety of accidents and misfortunes.(4) It is the object of the law to uphold, rather than to defeat conveyances, if the subject matter upon which they are to operate can be ascertained by any fair intendment.(5)

5. In regard to the forms of conveyances in the United States, it is said, that our ancestors brought with them the different methods of transferring real estate, which prevailed in the mother country; and such parts were adopted, as were not inapplicable to their new situation.(6)

6. A deed is either a *deed-poll*, or an *indenture*. The former is where an obligation is incurred, or an estate conveyed, by only one of the parties to a transaction, the other being a mere recipient. Thus a bond, or a grant in fee-simple, (in general,) is a deed-poll. An indenture, on the other hand, is where there are mutual transfers or covenants, the one in exchange for the other. Thus a lease is an indenture, consisting of obligations both by the lessor and the lessee. It follows from these explanations, that a deed poll is a single instrument, signed by one party, and delivered to the other. But an indenture consists of two or more parts, of the same tenor, both executed by both parties, and interchangeably delivered by the one to the other.(b) The name

(1) Co. Lit. 35 b; Touch. 50; 1 Bibb. 333.

(2) Dudley v. Sumner, 5 Mass. 472; Livermore v. Bagley, 3, 487.

(3) Jackson v. Wood, 12 John. 73; — v. Wendell, 12, 355; M'Millan v. Eastman, 4 Mass. 383; Lewis v. Baird, 3 McL. 56;

Crowell v. Maughs, 2 Gilm. 419; Underwood v. Campbell, 14 N. H. 393.

(4) Per Sewall, J., Hatch v. Hatch, 9 Mass. 312.

(5) Wing v. Burgis, 1 Shepl. 315.

(6) French v. French, 3 N. H. 255.

(a) Where the issue, in an action of trespass *quare clausum*, was, whether the plaintiff had a freehold estate; held, parol evidence that the defendant had received from the plaintiff a balance of purchase-money for the land, and that the plaintiff thereupon had taken possession, with the consent of the defendant, who said he renounced all his claim to the land; is inadmissible, as having no tendency to prove or disprove the fact at issue. Hunter v. Hatton, 4 Gill, 115.

An assignment of a land certificate not under seal does not pass the legal title, and is not proper evidence in an ejectment suit by a sheriff's vendee. Falkner v. Jones, 12 Ala. 165.

In Alabama, an instrument which in the body of it purports to be under seal, will be considered a deed, though no seal or scroll be annexed to the signature. Shelton v. Armor, 13 Ala. 647.

(b) One part of an indenture of two parts, signed by one party, is good against him. Hallett v. Collins, 10 How. 174. The two parts of an indenture were executed by the parties of the one part, and by some of the parties of the other part, with an agreement that one of

indenture originated from the practice of writing both parts of the agreement upon one parchment, with certain letters of the alphabet between them, and cutting the parts asunder in acute angles, *instar dentium*. Lord Coke mentions this formality as absolutely necessary to constitute an indenture, and that the use of the word *indenture* is no substitute for it. But this doctrine seems to be now obsolete.(a) By a deed *inter partes*, is understood an instrument commencing thus—"This deed, concluded on, &c., between A of the one part, and B of the other part."(1)

7. Where a question arose, whether a certain ancient transfer was a deed, or an authorized transfer upon the town books; it was held that the fact of its purporting to be an *indenture*, (as well as to be signed, sealed and delivered,) proved it to be a deed.(2)

8. The number of copies of an indenture ought to correspond with the number of parties. When the several parts are interchangeably executed by the several parties, the part executed by the grantor is usually called *the original*, and the rest *counterparts*. As has been already stated, however, it is now usual for all the parties to sign all the parts.

9. The counterpart of a deed has been received as sufficient evidence of such deed. If there is any variance between them, the terms of the latter are adopted, as the true understanding of the parties.(3)

10. It is said, that the execution of a deed vests the estate in the grantee, even without his assent or knowledge, unless he expressly disagree thereto; upon the grounds, that the conveyance is beneficial to the grantee, that the estate must have passed from the grantor, and that a suspension of the fee is against the policy of the law. (See *infra*, *Delivery*.) More especially, in case of a trust deed, delivery to a third person will be valid till the trustee dissents; and this he cannot do to the injury of the estate. If he does dissent, the deed is still valid, and Chancery will appoint a new trustee. So, in case of a deed to sureties, for their indemnity, they are presumed to accept it. Bringing a suit upon the deed is evidence of assent.(4)(b)

11. Though the assent of a grantee to a deed which is clearly for his benefit may be presumed, yet, if a consideration is to be paid, the assent must be proved.(5)

(1) Lit. 370; Co. Lit. 143 b, 229 a; Stile's case, 5 Rep. 20; 4 Bac. Abr. 51; Spencer v. Field, 10 Wend. 91. See Magee v. Fisher, 8 Ala. 320.

(2) Merwin v. Camp, 3 Conn. 41.

(3) Eyton v. Eyton, Prac. in Cha. 116; 4 Cruise, 11.

(4) Church v. Gilman, 15 Wend. 656; Ross v. Wilson, 7 S. & M. 753; Lady, &c. v. Mc-

namara, 3 Barb. Ch. 375. (See Sayre v. Townsends, 15 Wd. 647; Thompson v. Leach, 2 Ventr. 201; Thompson v. Leach, 3 Mod. 296; 3 Lev. 284; Show. Parl. C. 150; Townson v. Tickell, 3 Barn. & Ald 31; Dawson v. Dawson, Rice, 243; Field v. Arrowsmith, 3 Humph. 442.)

(5) Hurst v. McNeil, 1 Wash. 82.

the latter, who had executed the instrument, should obtain the signatures of his co-obligors to one part, to be then exchanged for the other part, which such party was in like manner to get signed. One part was executed accordingly, but never exchanged for the other, the execution of which was therefore not completed. Held, there was no legal delivery. Chandler v. Temple, 4 Cush. 285.

(a) It is said to be so in Maryland, Pennsylvania, and Virginia. 4 Griff. 907; 3, 245, 326.

(b) A deed, delivered to the agent of the grantee, vests the title in him before notice. But, if he dissents, it reverts in the grantor. Read v. Robinson, 6 Watts & S. 329.

12. It is said, a freehold must be *disclaimed* in a court of record, and not by words *in pais*; otherwise, with mere chattel interests. But the later and settled doctrine is, that a disclaimer may be by deed.(1)(a)

13. As acceptance of a deed beneficial to the grantee will be presumed; so the same presumption arises, if there is no express dissent, where a deed imposes upon him some act beneficial to another, and not injurious to himself. A remainder of freehold vests in a remainder-man, on the termination of the particular estate, until he disclaims, when it reverts to the donor or his heir.(2)

14. A deed of gift to a wife is good, if accepted by the husband. But a husband cannot deliver an instrument to his wife.(3)

15. Where a grantee of land gives a bond and mortgage for the price, he is presumed to accept the deed; and in a suit upon the bond cannot claim an allowance for a small deficiency in the quantity of land.(4)

16. It has been held in Massachusetts, that a deed does not pass an estate to the grantee, though formally executed and recorded, until he assents; that no man can make another his grantee, without his consent.(5)

17. In North Carolina, acknowledgment of a deed in court has been held to be proof of the grantee's assent to it.(6)

18. With regard to the necessary *parties* to a deed, of course no one interested in an estate can lose his right therein, without joining in the conveyance. It is said, that all those who are intended to take an *immediate* interest, under a deed indented, must also be parties to it by sealing it. But one may take a remainder without sealing the deed. Where the deed is a deed-poll, although, as has been seen, the grantee does not sign it, he becomes, by his acceptance of the deed, in some sense, a party, and may be bound by a covenant. (See ch. 83, s. 11, n.) An instance of the application of the above rule is, where a deed, made to one person, contains a reservation to, or a covenant with, another. Such covenant or reservation will be void.(7) (See ch. 84, *Exception*, &c.; also Vol. I, *Condition*.)

19. Where a deed, by its terms, is to be executed jointly and severally by two persons, and is actually signed by only one, such party is bound thereby.(8)

20. Where one of two joint tenants formally conveys his interest in

(1) 3 Rep. 26 a; Smith v. Wheeler, 1 Vent. 128; 4 Leon. 207; Hawkins v. Kemp, 3 E. 410. See Horne v. Booth, 3 Mann. & G. 733. n.

(2) Wilt v. Franklin, 1 Binn. 502; Bro. Abr. Done, 7.

(3) Brackett v. Wait, 6 Verm. 411; Folly v. Vantuyt, 4 Halst. 161.

(4) McDowell v. Cooper, 14 S. & R. 296.

(5) Harrison v. Phillips, &c., 12 Mass. 461. See Jones v. Maffet, 5 S. & R. 523; Jackson v. Bodle, 20 John. 184; Watson v. Watson, 13 Conn. 83; Davenport v. Prewett, 9 B. Mon. 94.

(6) Pearse v. Owens, 2 Hayw. 234.

(7) Salter v. Kidley, 1 Show. 59; Stover v. Gordon, 3 M. & S. 322; Co. Lit. 230 b; 231 a; 2 Inst. 673; Vin. Abr. *Faits* C. a; Com. Dig. *Faits* D. 1; Hornbeck v. Westbrook, 9 John. 73; Salter v. Kidgley, Carth. 76; Whitlock's case, 8 Co. 71. See Pearsall v. Post, 20 Wend. 111; Webb v. Holmes, 3 B. Monr. 405.

(8) Adams v. Bean, 12 Mass. 137; Cutter v. Whittemore, 10, 442. (But see Bean v. Parker, 17, 605.)

(a) Where a *feme covert* conveys, and a doubt arises whether she held the land to her own separate use; a disclaimer by the husband will perfect the purchaser's title. Rycroft v. Christie, 3 Beav. 238.

the land, and the other merely at the close of the deed relinquishes his right to the estate, but both execute the deed, it passes the estate of both. The effect would be the same, where a particular tenant of the freehold, and the remainder-man in fee, thus join in a conveyance.(1)

21. A deed, like other instruments, may be made as well by some third person duly authorized, as by the party himself. The authority must be under seal ;(a) especially if the execution is in the absence of the principal.(2)

22. A conveyance made by attorney must be made in the name of the principal. It must be the act of the latter, not of the former. Nor is it sufficient for the attorney in the deed to declare that he acts as such. Thus, where a wife, executing a deed, states that as well for herself as attorney for her husband, she makes the conveyance, but covenants in her own name, and sets her own hand and seal ; the deed does not purport to be his deed, but hers, and no estate of his passes. No

(1) *Lithgow v. Kavenagh*, 9 Mass. 161.

(2) *Tappen v. Redfield*, 1 Halst. Ch. 339 ; *Louthain*, 8 Blackf. 413 ; *Telford v. Barney*, 1 Iowa, 575.
Kinne v. Brooks, 9 Ired. 218 ; *Rhode v.*

(a) See *Piatt v. McCullough*, 1 McL. 82. It is said, where one signs a deed for others, he is bound by it, unless there be an express stipulation to the contrary. *Sterling v. Peet*, 14 Conn. 245. If a deed is made under a power of attorney, which has been previously revoked, but without notice to the grantee ; the deed is good. *Hancock v. Byrne*, 5 Dana, 514. In Vermont, a power of attorney must be a deed, acknowledged and recorded in the same office with the deed. Rev. St. 315.

The question sometimes arises, whether a deed made without authority has been *ratified* by the grantor.

A employed B to make sales of land. B made sales and conveyances of portions of the land, and took a conveyance of a tract to himself. B settled his agency with A, who gave B a writing, discharging him from further duties as agent, and certifying that he had well performed all the duties of his agency, and that he approved of the sales and conveyances made by B, and moneys received, and that they have settled and discharged each other from all obligations in the premises. A soon after died. On a bill by his heirs, for a conveyance of the land of which B obtained a conveyance ; held, the deed to him was void, unless subsequently ratified by A, and that such writing was not a ratification, without proof that A knew, when he made it, that B had received such deed. *Gage v. Pike*, 1 Smith, 145.

It is held in Tennessee, that an authority to execute a deed in the name of another must be by deed ; no previous parol assent, or subsequent adoption, will give it validity. *Smith v. Dickinson*, 6 Humph. 261.

But, after the lapse of time sufficient to bar a writ of right, it will be presumed that an attorney was properly authorized. *Goodwin v. McCluer*, 3 Gratt. 291.

The grantor or constituent, in a deed made by an attorney in fact, is not estopped from denying the authority of the attorney, as set out in the deed ; nor from denying that the deed was made in pursuance of another and valid authority, if in fact any such existed, at the time of making the deed. *Earle v. Earle*, 1 Spencer, 347.

If attorneys in fact for the grantor recite that they execute the deed for him, in pursuance of a certain letter of attorney, particularly describing it, and no such letter exists, or, if it exists, has never been proved or recorded, as prescribed by statute, the deed is a nullity, even though the attorneys, at the time of executing such deed, had on record another and valid letter of attorney. *Earle v. Earle*, 1 Spencer, 347.

A deed of trust, made by an attorney in fact, depends upon his power for its validity and the extent of its operations, and, if there are provisions and stipulations in it not warranted by the power, they are void as an excess of authority, but the deed in other respects will be valid. *Gimell v. Adams*, 11 Humph. 283.

A deed executed by an attorney in fact, in which he refers to the power of attorney, but conveys in his own name as attorney, and covenants and warrants in his own name on behalf of his principal ; but signed with the name of the principal, as by attorney ; is the deed of the principal. *Shanks v. Lancaster*, 5 Gratt. 180.

So, it is a sufficient execution of a deed by an attorney in fact, for his principal, if he signs the name of the principal with a seal annexed, stating it to be done by him as attorney for the principal ; or if he signs his own name, with a seal annexed, stating it to be for his principal. *Ib.*

confirmation of a deed thus executed will render the principal liable, short of sealing it.(1)(a)

23. So, where a deed is executed by three attorneys, it should be *acknowledged* by all of them as the act of the principal, not their own.(2)

24. But an attorney making a deed by authority, is *the party executing it*, and may make a valid acknowledgment.(3)

25. The above principle (sec. 22) was settled in an early case,(4) in which the reason is thus stated—"for he appoints the attorney to be in his place, and to represent his person;" and, though there is a dictum of Lord Holt somewhat to the contrary,(5) yet the doctrine is well settled by all the modern cases.

26. There is, however, a difference in this respect between grants of an individual, and those of the *public*. The latter may be made by an attorney in his own name. The reason is obvious. The government may grant without any deed. It is said, the seal of the Commonwealth (of Massachusetts) has been used chiefly for *political* purposes; and the practice, of a committee's affixing their own seals to a grant of public lands, having continued sixty years, and perhaps longer, cannot be said to be ineffectual. In fact the land passes by the resolve, rather than by the deed; only it is necessary to have some *conduit* to convey the title to the purchaser.(6)

27. So, in New Hampshire, a deed of town lands, executed by the agent of the town in his own name, has been held to be effectual, solely upon the ground of general usage, and the maxim, "*communis error facit jus*." And an agent authorized to convey lands of the State may do it in his own name. Richardson, Ch. J., suggests the distinction upon this subject, (applicable to individuals,) that where conveyances are made, by one acting as agent, *without consent of the owner*, a deed in the name of the agent is good; as, for instance, deeds made by collectors of taxes, sheriffs, executors, &c., and guardians.(7)

28. If one execute a deed, and covenant in several distinct capacities, in each of which he has authority to convey; the deed passes the estate of those whom he represents, in the same way as if he had made a separate deed in each capacity.(8)

29. Where a resolve of the legislature authorizes a *release* of public lands, a deed made by the public agent, with a warranty against persons claiming under the commonwealth, is not void as transcending

(1) Berkeley v. Hardy, 5 B. & C. 355; Mears v. Morrison, 1 Bree. 172; 8 D. & R. 102; Pryor v. Coulter, 1 Bai. 517; Fowler v. Shearer, 7 Mass. 19; Elwell v. Shaw, 16, 42; Frontin v. Small, 2 Ld. Ray. 1418; Bellas v. Hays, 5 S. & R. 427; Wilks v. Back, 2 E. 142; Andrews v. Hooper, 13 Mass. 476; Townsend v. Corning, 23 Wend. 435; Townsend v. Hubbard, 4 Hill, 351; Heffernan v. Addams, 7 Watts, 116; Clark v. Mix, 15 Conn. 152; Adams v. Tiernan, 5 Dana, 394; Anderson v. Browne, 9 Ohio, 151; Taggart v. Steenberry, 2 McL. 543; Hale v. Woods, 10 N. H. 470. See State v. Jennings, 5 Eng. 428; Cobb v. Arnold, 8 Met. 398.

(2) Lessee, &c. v. Condrion, 2 S. & R. 80.

(3) Lovett v. Steam, &c., 6 Paige, 54.

(4) Combe's case, 9 Co. 76.

(5) Parker v. Kett, 1 Ld. Ray. 658.

(6) Ward v. Bartholomew, 6 Pick. 414. (See Thorndike v. Richards, 1 Shepl. 430; Bestor v. Powell, 2 Gilm. 119; Edmondson v. Orr, 12 S. & M. 541.)

(7) Coffan v. Cockran, 4 N. H. 458; Thompson v. Carr, 1b. 515-6.

(8) Lithgow v. Kavenagh, 9 Mass. 161.

(a) The acknowledgment of a deed was in this form: "A's act, &c., as guardian aforesaid, and thereby the act and deed of said B." The decree for execution and acknowledgment was—"A, guardian for B." Van Ness v. Banks, &c., 13 Pet. 17.

his authority. Such warranty creates no obligation which would not have existed without it.(1)

29 a. In Vermont, after the Revised Statutes took effect, the Flower Brook Manufacturing Company, a private corporation, voted that "the agent be instructed" to execute a mortgage of the real estate of the corporation to a creditor. One William Wallace was then the general agent, and executed the deed in pursuance of the vote. The granting part was as follows: "The Flower Brook Manufacturing Company, by William Wallace, their agent, a corporation, &c., in consideration, &c., do give, grant," &c. All the covenants were in the name of the corporation. The *testimonium* clause was as follows:—"In witness whereof, we have hereunto set our hand and seal," &c. The deed was signed, "William Wallace, agent for Flower Brook Manufacturing Co." Held, this was the deed of the corporation.(2)

29 b. The acknowledgment was as follows:—"Personally appeared William Wallace, agent of the Flower Brook Manufacturing Co., signer and sealer of the above written instrument, and acknowledged the same to be his free act and deed." Held, an acknowledgment by Wallace, on the part and behalf of the corporation.(3)

29 c. Instrument, purporting to be the deed of the New England Silk Company, a corporation legally established, by A B, their treasurer, reciting its execution by him, in behalf of the company, as their treasurer, duly authorized for that purpose; signed and sealed by him, with his own name and seal, followed by the words: "treasurer of the New England Silk Company." Held, not the deed of the corporation.(4)

29 d. A statute made the selectmen, town clerk and treasurer, for the time being, of every town in the State, trustees of the ministerial and school funds, with power to convey lands belonging to those funds. Held, a deed executed by the treasurer, as such, and by two out of three selectmen, as such, was void.(5)

29 e. It has been held, that if a deed is signed by the agent of a corporation and the corporate seal affixed, it will be presumed that he was duly authorized to make such conveyance.(6)

29 f. But, where a deed purports to be executed by the trustees of a town, there must be evidence that the signers were trustees, and that they had power to convey.(7)

30. No particular form of words is necessary for an authorized agent to bind his principal by deed; provided his agency appears by the deed itself. Thus, a deed running as follows:—"I, A, agent for the B. Company, empowered by a vote thereof, in pursuance of said power, and for the consideration of, &c., received, to my full satisfaction, for and in behalf of said company, do give, &c.;" with covenants in behalf of the company, and signed and sealed by A, agent for said company, is the deed of the company.(8)

31. So, it is immaterial, whether the agent sign, "A, attorney for B," or "B, by his attorney, A."(9)

(1) Ward v. Bartholomew, 6 Pick. 416.

(2) McDaniels v. Flower Brook, &c., 22 Verm. 274

(3) *Ib.*

(4) Brinley v. Mann, 2 Cush. 377.

(5) Warner v. Stetson, 30 Maine, 231.

(6) Flint v. Clinton, &c., 12 N. H. 430.

(7) Wallace v. Dewey, 3 McLean, 548.

(8) Magill v. Hinsdale, 6 Conn. 464. *Contra*, Townsend v. Hubbard, 4 Hill, 351.

(9) Jones v. Carter, 4 Hen. & M. 184; Me. Rev. St. 373. (But see Spencer v. Field, 10 Wend. 87.)

32. So, where a deed was made in the name of the principal, but executed by the attorney, as follows:—"In testimony, &c., A, being duly constituted attorney, &c., has hereto set his hand and seal:—A and seal;" held, a valid conveyance.(1)

32 a. A deed, signed in the presence and at the request of P, and in the presence of an attesting witness, in these terms: "P, by M;" the whole deed, including the signature, being written by M; is properly executed as the deed of P.(2)

33. All persons may convey by deed, unless subject to the peculiar disabilities which will be hereafter mentioned.(a)

34. A corporation may be, in most cases, either a grantor or grantee, unless expressly restrained by its charter. English statutes, (1 Eliz. c. 10, and 13 Eliz. c. 12,) prohibit ecclesiastical and eleemosynary corporations from alienating, except by leasing, which is also subjected to certain restrictions. But these acts are not in force in the United States.

35. A person blind, deaf or dumb, or both deaf and dumb, may convey, if capable of understanding the nature of the transaction, and expressing himself by signs, or writing. And a deed, drawn by his directions, will be valid, if he be informed what lands are conveyed by it, though not informed whether it contains any covenants, or whether it is a deed or will.(3)

36. The deed of an infant, unless apparently beneficial to him, is either void or voidable. If merely voidable, he cannot plead *non est factum*, but must set forth his infancy specially; because the instrument has the form, though not the effect, of a deed. It has been said, in South Carolina, that the deed of a minor is *good for nothing*. The fact, that the deed is dated after the infant's coming of age, does not make it valid.(4)

37. A feoffment by an infant is only voidable, but all other conveyances *in pais* are void or voidable at his election; and he may maintain trespass against the grantee, without any entry to avoid the conveyance.(5)

38. The modern doctrine is, that *leases* made by infants, with or without rent, are only voidable, not void.(6)

39. In Connecticut, the deed of an infant is held voidable.(7)

40. The modifications of the general rule of law relating to *dower*, have been already referred to. (1. *Dower*) In Ohio, a wife of eighteen years of age may release her dower.(8)

41. Any deed, made by an infant voluntarily, which the law would have compelled him to make, is valid; as, for instance, a reconveyance, by the infant heir of a mortgagee, the mortgage debt being paid.(9)

42. An exception to the rule of an infant's disability to convey lands, is the case of a female infant, who undertakes to alienate her es-

(1) *Montgomery v. Dorion*, 7 N. H. 475.

(2) *Gardner v. Gardner*, 5 Cush. 483.

(3) Perk sec. 25; *Armstrong v. M'Ghee*, Addi. 261; *Brown v. Brown*, 3 Conn. 299.

(4) 4 Cruise, 15; *Thompson v. Leach*, 3 Mod. 310; *Thompson v. Bullock*, 1 Bay, 367; *Schreder v. Decker*, 9 Barr, 14. But see

Daniel v. Rose, 1 Nott & McCord, 33.

(5) *Dearborn v. Eastman*, 4 N. H. 441.

(6) Co. Lit. 45 b, u. 1.

(7) *Kline v. Beebe*, 6 Conn. 494.

(8) Walk. 326.

(9) *Zouch v. Parsons*, 3 Burr. 1794.

tate upon her marriage. As the marriage of an infant is itself valid, the law is in favor of upholding all contracts made in connection therewith, unless there be special reasons to the contrary. There seems to be, however, some confusion in the cases upon the subject, as to the distinction between actual conveyances, and mere covenants to convey, and the connection of the settlement, made by a husband, with the obligation or alienation of the wife. Thus, Lord Macclesfield said, that a covenant by a female infant, with consent of her guardian, to convey her estate in consideration of a competent settlement, though not a ground of action at law, would be enforced in equity. Lord Hardwicke limits this principle to certain cases; as where the settlement is a fair consideration for the wife's covenant, and, upon her death, her issue are entitled to portions under the settlement. Lord Thurlow was of opinion, that in the absence of any settlement by the husband, or even in case of a settlement not accepted by her after his death, the wife would not be bound by her covenant, however wise the arrangement might be; and that the court could not go into the competence of a settlement, but it must be taken to be good, till proved fraudulent. And where a bill in equity is brought against the widow, praying specific performance of marriage articles, it seems, in order to avoid performance, she should expressly waive the settlement made by the husband.(1)

43. It has been held in Pennsylvania, that the contract of a female infant, made in expectation of marriage, with the advice of her parents and guardian, is invalid, except perhaps in favor of issue claiming as purchasers; and that she may affirm or avoid it, at her election, upon the husband's death.(2)

44. In general, a male infant cannot bind himself by a contract, though made in connection with his marriage. But where such infant marries an adult female, who enters into articles with trustees for a settlement of her property; the husband, on coming of age, will be bound by such articles, not on his own account, but as assuming the obligations of the wife. The covenant of the husband shows merely his concurrence, and the absence of any fraud.(3)

45. An English Statute, (7 Anne, c. 19,) provides, that the Court of Chancery, or of Exchequer, may order and compel an infant trustee or mortgagee to convey his estate. But the act applies only to cases of trust, simply for the benefit of the *cestui*, not where there are special trusts to be executed by the trustee. Similar acts have been passed in some of the States, which may be noticed hereafter.(4)

46. It was the ancient doctrine, that an *idiot* or *lunatic* could not avoid his deed. But it is now settled, that the deed of an idiot is void, and also that of a lunatic, unless he assent to it on recovering his reason. And such deeds may be avoided by the heirs of the parties. But the feoffment of an idiot or lunatic is voidable, not void.(5)

47. If a person, having made a deed while lunatic, convey the same

(1) Cannel v. Buckle, 2 P. Wms. 243; Harvey v. Ashley, 3 Atk. 615; Durnford v. Lane, 1 Bro. 106; Clough v. Clough, 3 Wood-
erson, 453; Caruthers v. Caruthers, 4 Bro.
510.

(2) Shaw v. Boyd, 5 Ser. & R. 309; Tabb v.
Archer, 3 Hen. & M. 399.

(3) Slocombe v. Glubb, 2 Bro. 545.

(4) Cant. 10 Ves. 554; Atty. Gen. v. Pom-
fret, 2 Cox, 221; Bellamy, Ib. 422.

(5) Co. Lit. 247 a; Webster v. Woodford,
3 Day, 90; Lazell v. Pinnick, 1 Tyler, 247;
Den v. Moore, 2 South. 470.

lands to another grantee, after recovering his reason, the latter may avoid the first deed, there being sufficient privity of contract for that purpose.(1)

48. A similar act, (4 Geo. II, ch. 10,) exists in England, in regard to trustees who are lunatic, &c., to that already mentioned, (sec. 45,) in relation to infant trustees, &c. Another statute provides for the conveyance or mortgaging of the estates of such parties, by committees, under the direction of Chancery.

49. The deed of a married woman, in England, has been held absolutely void, not merely voidable, both in law and equity.(a) Hence, the general rule is, that such deed is not susceptible of confirmation by any act done after the coverture ceases. Thus, if husband and wife mortgage her estate, and after his death she receives the profits and pays the interest, still she may avoid the deed. In some instances, as has already been stated, (Vol. I, ch. 15,) a *lease* constitutes an exception to this rule; and certain formal acts have also been held a confirmation of other conveyances made by a married woman. Thus, where husband and wife mortgaged her land, and after his death she acknowledged the instrument by three different papers; held, a confirmation, and equivalent to a redelivery of the deed. But, by Statute 3 & 4 Wm. IV, c. 74, a married woman may convey, with consent of the husband, and upon a separate acknowledgment by her. The subject of conveyances by married women in the United States has been already briefly considered, (Vol. I, ch. 7,) and will be further noticed hereafter.(2)(b)

50. All persons may be grantees, because a conveyance is presumed

(1) *Cates v. Woodson*, 2 Dana, 454.

(2) *White v. Cuyler*, 6 T. R. 176; 1 Esp. 200; 1 *Nott & McCord*, 33; *Albany, &c. v. Bay*, 4 Comst. 9. Held, in Kentucky, that re-

delivery of a deed by the wife after her husband's death, she knowing the effect of it, operates as a confirmation. *Smith v. Shackelford*, 9 Dana, 475.

(a) By the common law, the only mode in which a married woman could alienate her lands, was by fine and recovery. *Albany, &c. v. Bay*, 4 Comst. 9.

The rule was never in force in New York, certainly not in 1697. *Meriam v. Harsen*, 2 Barb. Ch. 232.

(b) A married woman cannot alone make a valid deed of her own lands, so as to bind even her own interest. *Harris v. Burton*, 4 Harring. 66.

So, a conveyance executed and acknowledged by husband and wife, but in the body of which the wife's name is not inserted, does not convey the interest of the wife. *Cox v. Wells* 7 Blackf. 410.

So, a letter of attorney for the sale and conveyance of lands, executed by a man and his wife, is a nullity, so far as respects the wife; she cannot sell and convey her own lands, or bar her dower in her husband's land, by a letter of attorney. It is the letter of attorney of the husband alone, in legal effect; and, whether joint or several, in form, the death of the wife is no revocation. *Earle v. Earle*, 1 Spencer, 347.

A deed of husband and wife, executed under a power of attorney, is valid against him, though void as to her. *Shanks v. Lancaster*, 5 Gratt. 110.

Where an occupant of land under a title bond, having paid the price, absconds from the State, and his wife afterwards obtains the legal title from the vendor, and conveys the land during coverture; the husband may still recover the land from the purchaser upon his possession, the wife's deed being void. So, although she is divorced after her conveyance to the defendant. *Adams v. Frampton*, 9 Ala. 124.

In New York, a conveyance by a wife to trustees for the benefit of her husband, of her separate property, if procured through undue influence exercised by him over her, will be set aside in equity. *Fry v. Fry*, 7 Paige, 461.

But a married woman may make a conveyance to her husband through a third person, to the same effect as if the estate was held by a trustee, with a power in her to appoint it to whom she pleased: and all that a court of chancery will do in such cases, is to see that the wife has not been imposed upon by her husband, by his taking an unconscientious advantage of her situation. *Meriam v. Harsen*, 2 Barb. Ch. 232.

to be beneficial to the purchaser. Thus, if an infant purchase lands, he is bound, unless after coming of age he waive or dissent from the deed, in which case he may claim under another title. But unless he affirm it after coming of age, his heir may disaffirm it. A wife cannot take a conveyance directly from her husband, even of his interest in her real estate.(1)

51. An insane person or idiot may be a grantee. If the former never recover his reason, or, after recovering, never affirm the deed, his heir may avoid it. But an affirmation after such recovery renders the deed unavoidable.(a)

52. An alien may be a grantee of lands, and may legally hold them, till they are claimed by the State by escheat. In England, *denization* enables one to hold lands subsequently purchased, and even those purchased previously, if the king confirms his estate. In the United States, it has been seen under the head of *Descent*, the common law disability is very generally removed. It may be remarked, in general, that whenever an alien may *inherit*, which is the act of law, he may *a fortiori* hold *purchased* land, as even the common law allows him to *take* by purchase, while it never vests an estate in him by inheritance. In some instances, perhaps, an alien may validly purchase, where he cannot inherit; but these are too few to deserve special notice.(2)(b)

53. A married woman may be a grantee,(c) but her husband may dissent from the deed, and defeat the estate. If he die without doing it, or even after expressly assenting, the wife may waive the deed. And her heirs may do the same, unless she assented after the husband's death.(3)

54. At common law, a man cannot convey directly to his wife. But, under the statute of uses, he may convey to a third person for her use, or covenant with a third person to stand seized to her use.(4)(d)

(1) Co. Lit. 2; Parker v. Stuckert, 2 Miles, 278; Davenport v. Prewett, 9 B. Mon. 94.

(2) 4 Cruise, 20-1.

(3) Co. Lit. 3 a; Baxter v. Smith, 6 Binn. 427. Harmon v. James, 7 S. & M. 111.

(4) Co. Lit. 112 a.

(a) See Marrow, 1 Cr. & Ph. 142; Walker, Ib. 147.

(b) Even at common law, an alien may take a lease for years of a house, for the benefit of trade. Lord Coke limits this right to alien merchants, and to their own lives. But this rigorous construction has been doubted by Mr. Hargrave, and Chancellor Kent thinks it inapplicable to the citizens of those nations with which we have commercial treaties; and that the provision for naturalizing aliens and their families, after five years' residence, implies the right to use real property in the meantime. An alien may also take a mortgage as security, and have a foreclosure in equity, and a sale; though it seems he is not himself allowed to purchase the land. In Virginia, contrary to the common law rule, a citizen, *bona fide* purchasing from an alien, holds against the State. A similar provision was made in New York, by act of 1826. In New York, an alien cannot demise or lease real property, though he may otherwise convey it. Co. Lit. 2 b; Harg. a. 9, b. 1; 2 Kent, 61-2-3; 1 N. Y. R. St. 720. In South Carolina, aliens may recover money lent, and also in Chancery have a decree for sale of land mortgaged as security, but no remedy to recover possession of the land, or foreclosure. Contracts for and grants of land are valid in favor of aliens, if they afterwards declare their intention to be naturalized; so also in favor of those claiming through aliens. In such case, an alien may convey or devise to children or grandchildren; and, if he does not, the property descends; provided, however, the party beneficiary becomes resident in the State in twelve months from the conveyance or descent, and a citizen as soon as the law will allow. 1 Brev. Dig. 7-17-8. See Wootton v. Steffenoni, 12 Mees. & W. 129.

(c) A deed of a legal estate to a married woman passes a legal, not an equitable title. Hileman v. Bonslaugh, 1 Harr. (Penn.) 344.

(d) In Massachusetts, by St. 1845, (p. 354,) by a written, ante-nuptial contract, husband and wife may agree that she shall hold her own property, separately, or subject to any limitations, which are not illegal; and this contract has the same effect as a deed to her at the

55. In England, by the statutes of mortmain, corporations cannot take lands by deed, without license. A late Statute (9 Geo. II, c. 36,) prohibits all limitations to *charitable uses*, except under the restrictions therein specified; the object and effect of which is, to prevent *devises* to charitable uses, leaving conveyances as before, if made with the prescribed formalities.

56. In Pennsylvania, it is provided that literary, charitable, or religious corporations may hold lands, with the restriction that the proceeds of their real estate and money lent shall not exceed £500 per annum.(1)(a)

57. In New York, it is held, that a grant to "the people of the county A" is void.(b) So a grant to the inhabitants of an unincorporated town.(2) (See *infra*, ch. 84, sec. 24 and sequ.)

58. At common law, according to the weight of authority, a deed was valid without *consideration*, whether it were a conveyance of land or a contract for the payment of money, as a bond. A deed, being made with deliberation, was received as a *lien final* to the party, whose will alone was regarded as consideration sufficient.(3) It has already been stated, (Vol. I, *Implied Trusts*,) that the want of consideration in a deed may sometimes raise a use or trust for the grantor. And it will be seen hereafter, that this circumstance will render a deed void as to his creditors. (See *Fraudulent Conveyance*, ch. 89.)

(1) Purd. Dig. 164-6.

(2) Jackson v. Cory, 8 John. 385; Hornbeck v. Westbrook, 9, 73.

(3) Sharington v. Stroffer, Plow. 308; Bac.

Read. 13; 1 Con. (S. C.) 131; Pillans v. Meier, 3 Burr. 1670; Rann v. Hughes, 7 T. R. 350, n.; Page v. Trufant, 2 Mass. 159; Brown v. Bank, &c., 3 Barr, 187.

marriage. A schedule must be inserted, sufficiently exact to give notice to creditors, and the instrument recorded, before or within ninety days after marriage, in the county where the husband resides, or, if he is out of the State, in the county of her residence, if made before marriage; if after, the county of her last residence. Any party competent to convey or devise may convey or devise to a married woman, to her sole use, without any trustee, any estate. Within ninety days, the instrument shall be recorded in the county where the husband resides, or, if he is out of the Commonwealth, in the county where the grantor resides; otherwise, the property may be taken by creditors of the husband. In both the cases above named, the wife, with respect to the separate property, has the rights and incurs the liabilities of a *feme sole*, and is also liable upon and on account of all ante-nuptial contracts or wrongs. This statute does not enable a husband to convey directly to the wife; nor does it affect the claim of curtesy. Upon petition of the wife, the Supreme Court may appoint a trustee of her property; to whom she may then convey it. The property shall still be liable in suits against her; but her rights as a *feme sole* will cease. The above provisions do not dispense with registration in the county where the land lies. See Vol. I, p. 124.

In Maine, by St. 1844, Mar. 22, a married woman may become seized or possessed of any property, real or personal, by direct bequest, devise, gift, purchase or distribution, in her own name, and as of her own property; provided she makes it appear, in any issue touching her title, that it does not in any way come from the husband after coverture.

By the same act, when a woman, possessed of real or personal property, shall marry, it shall continue to her, as her separate property, free from the husband's liabilities.

But a wife may release to the husband the control of her property, and he may then receive and dispose of the income, while applied to their mutual benefit.

In New Hampshire, if a wife from her separate estate pays part of the price of land, which is conveyed to her with the husband's assent; her title is good against all but his creditors. *Marshall v. Pierce*, 12 N. H. 128.

(a) In general, the rights of a corporation in this respect depend upon the terms and object of its charter. Any further consideration of the subject would lead to inquiries of much interest and extent; but foreign from the plan of the present work.

(b) In Maine, (Rev. St. 373,) conveyances to counties are made valid, if for their benefit, by whatever name they are designated. As to a conveyance to a town, see *Sewall v. Car-gill*, 3 Shepl. 414.

59. Upon this subject it has been said, at common law a *feoffment* was valid without consideration; or, if any was implied, it was the feudal duty or service resulting to the grantor. Since the statute *quia emptores*, no such duty is implied. Hence an opinion has prevailed, that a consideration has since become necessary.(1)

60. It has been held in Massachusetts and Maine, that by virtue of the statutes of conveyances, a deed may be construed as a *feoffment*,(a) where the intent so requires, to which, at common law, no consideration is necessary.(2)(b)

61. But in New York, in a case where the deed could operate, if at all, only as a bargain and sale, a consideration was held necessary.(3) In another case, Chancellor Kent remarked, that the better opinion is, that the notion of a consideration first came from equity, where it was required to create a use; and hence, when conveyances to uses were adopted, courts of law held a consideration necessary to a bargain and sale. But such requisition is merely formal, a peppercorn being sufficient to raise a use. And the Chancellor seems to admit that a *feoffment* requires no consideration.(4)(c)

62. A deed, made for "divers good and valuable considerations," and also in consideration of \$10, is a good bargain and sale.(5)

63. A quit-claim deed is a conveyance at common law, and good, though the consideration is indefinitely set forth; as "for divers good causes and considerations."(6)

64. The support of the Gospel is sufficient consideration for a release.(7)

65. Although a consideration is in general unnecessary to the validity of a deed *at law*, yet a court of equity will not enforce a deed made without consideration. A voluntary conveyance, good at law, is good also in equity; but a voluntary defective conveyance, inoperative in law, will not be aided in equity. So equity will not aid one party against another, where both stand upon the same equitable ground. Thus, in the case of two conveyances, both of which are without consideration, the latter will not be assisted against the former.(8)

66. Considerations are of two kinds, viz., *civil* or *valuable*, and *moral* or *good*. Money is the most common valuable consideration; but it may consist in *marriage* also, which is regarded in law in the light of a pecuniary advancement. So, in assuming a lien on the lands or covenanting to pay debts. A good consideration is commonly the affection which a man has for his children or relatives, and his desire to promote

(1) *Green v. Thomas*, 2 Fairf. 321-2.

(2) *Marshall v. Fisk*, 6 Mass. 24; *Emery v. Chase*, 5 Greenl., 232; *Green v. Thomas*, 2 Fairf. 321.

(3) *Jackson v. Florence*, 16 John. 47.

(4) *Jackson v. Alexander*, 3 John 484.

(5) *Maccubbin v. Cromwell*, 7 Gill & J.

157.

(6) *Rogers v. Hillhouse*, 3 Conn. 402.

(7) *Reformed, &c. v. Veeder*, 4 Wend. 494.

(8) *Treat. of Eq. B. 1, ch. 5, sections 2, 3*; *Osgood v. Strode*, 2 P. Wms. 245; *Colman v. Sarrel*, 1 Ves. 54; *Goodwin v. Goodwin*, 1 Ch. R. 173; *Stickney v. Boran*, 2 Barr. 67; *Dubbs v. Finley*, 2 Barr. 397.

(a) See ch. 81.

(b) In Florida, where there is no consideration of benefit or advantage to the grantor or of detriment to the grantee, the deed is *nudum pactum*. *Southern Life, &c. v. Cole*, 4 Florida, 359.

(c) In ejectment to try the legal title to land, the question whether a deed, in which the consideration expressed is one dollar, is fraudulent in fact, cannot be tried. Such nominal consideration is sufficient to sustain the deed. *Meakings v. Cromwell*, 2 Sandf. 512.

their interest. Equity considers the relation of parent and child as the foundation of a moral obligation, and the latter as a creditor of the former. Payment of a debt is sometimes classed as a good consideration. A conveyance founded on good consideration is *presumed* to be valid.(1)

67. Where the consideration of a deed is paid to a third person, by direction of the grantor, this is equivalent to a payment to the grantor himself. And even a subsequent assent to this form of payment has been held to have the same effect. As where a wife admits that the consideration, for which her husband contracted, shall operate as a valuable consideration to herself. So where the consideration of a bargain and sale is paid by one of the bargainees, this is sufficient to vest the estate in all.(2)

68. When one consideration is expressed in a deed, any other consistent with it may be averred and proved. Thus, where a deed from father to son purports to be for a pecuniary consideration, it may be still set up as an advancement, because the estate may have exceeded in value the sum expressed. And, *a fortiori*, where the consideration of love, &c., is expressed, though a very small pecuniary consideration is also added. So, where the consideration expressed is "natural love and affection," it may be proved, for the purpose of upholding the deed against creditors of the father, that the son gave him a bond to support his wife and children. So the consideration of natural affection may be averred, besides the valuable consideration expressed, to give effect to a conveyance *in futuro*, as a covenant to stand seized; though the consanguinity of the parties is not mentioned in the deed.(a) It is said, a man is estopped by his deed to deny that he granted, or that he had good title to the estate conveyed, but he is not bound by the consideration expressed, because that is known to be arbitrary, and is frequently different from the real consideration.(3)

69. Where no consideration is expressed, any lawful one may be averred, and the averment submitted to a jury; especially if the case is not within the statute of frauds.(4)

70. A deed imports a consideration; and cannot be avoided merely because it mentions none. The want of consideration must be proved. So, where one deed is made the day after another, the first expressly upon a lottery consideration, and the last upon a nominal pecuniary consideration; no presumption can arise, that the last was also for a lottery consideration.(5)

71. But the averment of a consideration which does not appear by

(1) 4 Cruise, 23; Tunno v. Trezevant, 2 Des. Cha. 269; Caborne v. Godfrey, 3, 519; Ward v. Webber, 1 Wash. 278; 1 John. Cha. 329; Adamson v. Lamb, 3 Blackf. 448; Frazer v. Western, 1 Barb. Cha. 220; McWhorter v. Wright, 5 Geo. 555.

(2) Lithgow v. Kavenagh, 9 Mass. 177; Maccubbin v. Cromwell, 7 Gill & J. 166-7.

(3) Hatch v. Straight, 3 Conn. 31; Quarles v. Quarles, 4 Mass. 682; Mildmay's case, 1 Co. 176; Rex v. Inhabitants, &c., 3 T. R.

474; Wallis v. Wallis, 4 Mass. 136-7; Wilkinson v. Scott, 17 Mass. 249; Gale v. Coburn, 18 Pick. 397; Gale v. Williamson, 8 Mees. & W. 405; Mead v. Steger, 5 Port. 498.

(4) Stearns v. Barrett, 1 Pick. 449; Bowen v. Bell, 20 John. 338; Frink v. Green, 5 Barb. 455.

(5) Boynton v. Rees, 8 Pick. 332; Jack v. Dougherty, 3 Watts, 151; Den v. Ogden, 4 Wash. C. 139; Briggs v. French, 2 Sumn. 251.

(a) See ch. 81, *Covenant to stand seized*.

the deed is said to be allowable, only where a use is declared, not where the use itself depends upon proof of the consideration.(1)

72. In New Hampshire, Richardson, Ch. J.; treats the subject of the consideration of deeds as one upon which there is a conflict of authorities. He remarks, that it seems to be well settled as a general rule, that where a pecuniary consideration is expressed, a court of law permits no averment to the contrary. It has been held in some cases, that if a particular consideration is expressed, no other can be averred. In other cases, it has been held that any consideration consistent with the one expressed may be averred. These authorities may be probably all reconciled, by advertng to the different purposes for which an attempt has been made to show other considerations than those expressed, and to the different kinds of considerations which have been expressed. It is perfectly well settled, that a consideration expressed in a deed cannot be disproved, in order to defeat the conveyance, except for fraud;(a) as in case of a deed of bargain and sale, to which a pecuniary consideration is necessary. But, for other purposes, the acknowledgment of the receipt of money in a deed may be contradicted. Thus, where two trustees, joining in a conveyance, acknowledge the receipt of the consideration, one may show that no part of it came to his hands. So in any case, where a deed acknowledges receipt of the consideration, it may be shown that it was not paid,(b) and an action brought to recover it. Upon the same ground, in an action for breach of the covenant of seizin, a different consideration may be shown from that which is expressed, for the purpose of settling the amount of damages.(2)

73. This last point has also been settled the same way in Connecticut. It was said, the only operation of the consideration clause is, to prevent a resulting trust in the grantor, and estop him to deny the deed for the uses mentioned. Hosmer, Ch. J. dissented.(3)

74. In Vermont, it seems to be held that a deed of bargain and sale is invalid, if made without consideration. But it was also held, that where such deed contained the clause, "for and in consideration of dollars, current money," &c., parol evidence was admissible to

(1) *Storer v. Batson*, 8 Mass. 443.

(2) *Morse v. Shattuck*, 4 N. H. 229; *Pritchard v. Brown*, 4 N. H. 397; *Fisher v. Smith*, Moore, 569; *Shep. Touch.* 223; *Clarkson v. Hanway*, 2 P. Wms. 203; *Schemerhorn v. Vanderheyden*, 1 John. 139; *Howes v. Barker*, 3, 506; *Maigley v. Haner*, 7, 341; *Kip v. Deniston*, 4, 23; *Shephard v. Little*, 14, 210; *Preston v. Merceau*, 2 W. Bl. 1249; *Cromwell's case*, 2 Co. 76; *Mildmay's case*,

1, 175; *Wilt v. Franklin*, 1 Binn. 502; *Buffum v. Green*, 5 N. H. 82; *Beach v. Packard*, 10 Verm. 96; *Grout v. Townsend*, 2 Hill, 554; *Clapp v. Tirrell*, 20 Pick. 247; *Taggart v. Stanbery*, 2 McL. 543; *Burbauk v. Gould*, 3 Shepl. 118; *White v. Miller*, 22 Verm. 380; *Bolles v. Beach*, 2 N. J. 680; *Grout v. Townsend*, 2 Denio, 336; *Rolfe v. Haner*, 1 Gill, 84; *Meriam v. Harsen*, 2 Barb. Cha. 232.

(3) *Belder v. Seymour*, 8 Conn. 304.

(a) In such case, the consideration clause is held the slightest kind of *prima facie* evidence. *Clapp v. Tirrell*, 20 Pick. 247.

In New Hampshire, it is held to be no evidence; but, as against creditors who levy upon the land, the deed is presumed to be voluntary and fraudulent, till some other proof of consideration is offered. *Kimball v. Fenner*, 12 N. H. 248.

In Maryland, the receipt in a deed, acknowledging payment of the consideration, is only *prima facie* proof, and may be contradicted or explained by parol evidence. *Elysville, &c. v. Okisko, &c.*, 1 Maryland Ch. Decis. 392.

(b) Or that it was left with the grantee, to be paid to a third person. 3 Shepl. 118; acc. *Thayer v. Viles*, 23 Verm. 494; *Barnum v. Childs*, 1 Sandf. 581; *Morgan v. Bittenberger*, 3 Gill, 350.

prove, as the consideration, the payment of money by the grantee on account of the grantor. The court remarked, that this clause might be read "in consideration of dollars," &c., which would mean two or more dollars, and express consideration enough; or, "in consideration of blank dollars," which would mean *no dollars*.(1)

75. So, where the only clause of a deed, relating to the consideration, was, "for good consideration, me thereunto moving;" it was held, that the jury might infer from circumstances a legal consideration.(2)

76. In the case of *Powell v. Monson, &c.*,(3) Judge Story remarks upon the conflict of authorities in relation to the consideration of a deed. He cites the opinion of Lord Hardwicke, that where a consideration is named, no other can be proved, unless the clause is added, "and for other considerations." Other authorities, and among them that of the court in New York, are to the same effect.(4) But there are many contrary decisions, including those of Lord Kenyon, and Lord Chief Justice Willes; and perhaps the preponderance of authority is in favor of the latter.(5) But however this may be, Judge Story holds, that the parties are estopped to *deny* the consideration stated, and cannot therefore aver another one as the *sole* consideration.

77. In Pennsylvania, where a deed of bargain and sale states a money consideration, the additional consideration of advancing the bargainor's daughter in marriage may be proved. Whether a consideration contrary to the one expressed, *qu?* If, in a bargain and sale, a blank be left for the consideration, it is void. But if such deed recite a consideration, the jury cannot find that there was none.(6)

78. In South Carolina, it is said, a party cannot at law offer parol proof of a *different* consideration from that which is expressed; but he may, it seems, of a greater or less, of the same character. In Kentucky, if a mortgage recites that it is given to secure a loan; the mortgagor is estopped. But not to prove *illegality* of consideration. In Maryland, when a deed is rendered inoperative and void, by disproving the consideration expressed, evidence of a different consideration will not be received to support it. But where a party maintains the validity of a deed, and seeks, upon the allegation that the consideration has not been paid, to enforce its payment by the assertion of the vendor's lien, evidence may be admitted, to prove that he has been satisfied for the purchase-money, by receiving something else, as an equivalent. In Vermont, parol evidence is admissible that the sum expressed in a deed to be the consideration, and which was received by the grantor, was in fact received by him as the consideration, and also as payment of a debt. In Arkansas, a plea, averring the consideration of a deed to be other than that expressed, but not to be in writing, is bad.(7) In North Carolina, where a deed is attacked on the ground of fraud, it is

(1) *Wood v. Beach*, 7 Verm. 522. (See *Brackett v. Wait*, 6, 411.)

(2) *Stevens v. Stevens*, 3 Verm. 448.

(3) 3 Mas. 358-9; *Peacock v. Monk*, 1 Ves. 190.

(4) *Clarkson v. Hanway*, 2 P. Wms. 203; *Shep. Touch.* 222, 510; *Jackson v. Delancey*, 4 Cow. 427.

(5) *The King v. Scammonden*, 3 T. R. 474; *Villers v. Beaumont*, 2 Dyer, 146; *Bedell's*

case, 7 Co. 40; *Vernon's case*, 4, 3; *Doe v. Salkeld*, Willes, 673.

(6) *Hayden v. Mentzer*, 10 S. & R. 329; *Moore v. Lessee, &c.*, 4 Binn. 4; *Wilt v. Franklin*, 1, 502.

(7) *Garrett v. Stuart*, 1 McCord, 514; *Norris v. Norris*, 9 Dana, 317; *Elysville, &c. v. Okisko, &c.*, 1 Md. Ch. 392; *Harwood v. Estate, &c.*, 22 Verm. 507; *Bird v. Smith*, 3 Eng. 368.

competent to show, in addition to the consideration expressed, the motives of the grantor in making it; such as the relationship of the parties, or the great affection of the grantor for the grantee.(1)

79. A deed must be written or printed upon paper or parchment. It may be in any language or character.(2)

80. It is the general rule, that a deed must be wholly written before sealing and delivery. If a paper be sealed and delivered, with directions to fill it up with an agreement, which is done, this is no deed. Whether blanks may be filled up after execution, seems to be an uncertain point. In one case it was held, that a deed of revocation, making a new settlement, was valid, notwithstanding this circumstance. But it has been held in Pennsylvania, that the purchaser of an estate is not bound to accept a deed in which a blank is left for the consideration, although the grantor has authorized his agent to fill it up.(3) (See *infra*, *Alteration of Deeds*.)

81. In England, all deeds are required to be *stamped*. But the law prescribes this formality, only as a requisite for using the deed in any legal proceeding, and not as necessary to its actual validity. Hence it is sufficient, if it be stamped after the execution.(4)

82. A deed contains certain formal parts, which properly enter into its composition, in order to constitute a perfect instrument; although not absolutely necessary to its validity. The *construction* of these several parts will be considered hereafter. A few remarks only will be made in this connection, in relation to their general nature and object.

83. The *premises* of a deed consist of the introductory part, including the *date*, (which, however, is sometimes put at the end,) the *names and descriptions of parties*, the *recital*, *consideration* and receipt thereof, the *grant*, *description*, and *exception*, if any.(5)

84. The *habendum* declares the estate or interest granted; which may also be done in the premises. The description need not be repeated in the *habendum*.

85. The *tenendum*, accompanying the *habendum*, expresses the tenure of the estate, but is a merely formal clause.

86. The *reddendum* is a reservation to the grantor of some new thing from the land—such as rent.(6)

87. Then follow the *conditions*, if any; the *warranty*, and covenants, the nature and effect of which will be explained hereafter; and finally, the *conclusion*, mentioning the execution, and the date, either expressly, or by reference to the beginning.

88. A deed must be *read*, if any party so require; by himself, if able to read, if not, by some one in his presence. If misread, it is so far void, unless this is done by collusion, for the purpose of avoiding it. But a grantor is presumed to know the contents of the deed.(7)

89. *Signing and sealing* is the next requisite to a deed.(a) The prac-

(1) Potter v. Everitt, 7 Ired. Eq. 152.

(2) Co. Lit. 229 a; 2 Black. Com. 297.

(3) Touch. 54; Ayres v. Harness, 1 Ohio, 368; Paget v. Paget, 2 Cha. R. 187; Moore v. Bickham, 4 Binn. 1.

(4) 4 Cruise, 24.

(5) Co. Lit. 6 a.

(6) Co. Lit. 47 a.

(7) Manser's case, 2 Rep. 3; Thoroughgood's case, Ib. 9; Shulter's case, 12 Rep. 90; Skin. 159; Bennet v. Vade, 2 Atk. 327; Rex v. Longnor, 1 Nev. & M. 576; Kimball v. Eaton, 8 N. H. 391.

(a) To an action of covenant upon an indenture of lease, by the lessor against an assignee of the lessee, it is a bad plea, that the indenture is not signed by the plaintiff or his agent. The sealing is enough, and the defendant is estopped. Aveline v. Whisson, 4 Mann. and G. 801.

tice of sealing arose in England at the Norman conquest. Every individual had his own private waxen seal. Till the reign of Charles II, signing was not requisite; but there could be no deed without a seal. And the term *deed* is now held to imply a seal. It is sufficient, however, if a party either previously authorize another to seal for him, or subsequently adopt such seal as his own, by delivery of the deed. One piece of wax may serve for several seals, if distinct impressions be made upon it by the respective parties, and this circumstance recited in the conclusion. And when an instrument between two parties concludes, "given under our hands and seals," and the name of the first signer alone has a seal after it, the other signing immediately below; it is a sealed instrument, upon which assumpsit does not lie.^{(1)(a)}

90. Two or more several signers of a deed may adopt one seal. And such adoption may be inferred from the facts, that the deed, &c., contains the allegation "sealed with our seals," and that one of the makers signs and delivers it as his deed, without a new seal, after a signing and sealing by the others.⁽²⁾

91. But the same contract may be the specialty of one party and the parol agreement of another.⁽³⁾

92. The recital, "the parties hereunto set their hands and seals," is insufficient without an actual sealing; and, on the other hand, such sealing is sufficient without this recital.⁽⁴⁾ (See sec. 98.)

93. A seal is an impression upon wax, a wafer, or some other *tenacious substance*.^(b) This is the common law definition; but, in the United States, either this definition must be considered as extensively changed, or the requisite itself done away. Thus, in Pennsylvania, a *written or ink seal* is good; but not a horizontal slit with a ribbon drawn through it, opposite the name of the party, though it was intended to cover it

(1) 4 Cruise, 25-6; Mackay v. Bloodgood, 9 John. 285; Hatch v. Crawford, 2 Porter, 54; Bradfield v. McCormick, 3 Blackf. 162; Ansley v. Nolan, 6 Por. 379; Van Blaricum v. Yeo, 2 Blackf. 323 and n.; Taylor v. Morton, 5 Dana, 365; Mapes v. Newman, 2 Pike, 469; Sleigemberg v. Carr, 3 Mann. & G. 191; Underwood v. Campbell, 14 N. H. 393.

(2) Pequawkett v. Mathes, 7 N. H. 230; Davis v. Burton, 3 Scam. 44; Townsend v. Hubbard, 4 Hill, 351; Bank, &c. v. Bughee, 19 Maine, 27. See Van Alstyne v. Van Slyck, 10 Barb. 383.

(3) Stabler v. Cowman, 7 Gill & J. 284.

(4) Taylor v. Glaser, 2 Ser. & R. 504; Vance v. Funk, 2 Scam. 264.

(a) A quit-claim deed from two grantors, signed and sealed by each of them, and signed by their wives, with one seal against both signatures, and concluding, after the clause of release of dower, "in witness whereof, we, the grantors, have hereunto set our hands and seals;" is sufficient to bar the dower. Tasker v. Bartlett, 5 Cush. 359.

The above rule applies, where the seal is claimed to be the joint seal of the plaintiff and defendant in the suit. University, &c., v. Goslyn, 21 Verm. 52. Where there are several signers and only one seal or scroll, whether all intended to adopt it is a question for the jury; but an instrument signed by two, with one seal, is *prima facie* sealed, and the party contesting that it is so should aver, by plea, that it is not a sealed instrument. Lambden v. Sharp, 9 Humph. 224.

(b) Tasker v. Bartlett, 5 Cush. 359. It is held in New York, that an impression made directly upon the paper is not a lawful seal, except in the case of public officers and courts. 2 Rev. St. 404; Farmers, &c. v. Haight, 3 Hill, 493. See Stanton v. Camp, 4 Barb. 274. So in Vermont, Maine and New Hampshire, this exception has been recognized by statute. Verm. Rev. St. 53; N. H. Rev. St. 44; Me. Ib. 45.

A certificate of the acknowledgment of a deed, before the clerk of a court, is sufficiently authenticated, by an impression of the seal of the court upon the paper, without any wax, wafer, or other tenacious substance. Pillow v. Roberts, 13 How. U. S. 472.

The impression of a distinctive corporation seal on an instrument calling for the seal of the corporation, although without wax, wafer, or other like substance, was held to be a seal. Corrigan v. Trenton, &c., 1 Halst. Ch. 52.

with wax. So in Ohio, Missouri, Virginia, (by usage, prior to the statute) Maryland, Alabama,^(a) New Jersey, Delaware, Indiana, Illinois, Tennessee, Michigan, (except where official seals are required,) Kentucky, (even in the case of corporations,) and, according to Chancellor Kent, the Southern and Western states, New Jersey inclusive, a *scrawl* or *flourish* is allowed instead of a seal.^{(1)(b)}

94. In Ohio, a scrawl or other seal at the end of a signature is *prima facie* a seal, though not mentioned in the *testatum* clause. In that State a statute provides, that wherever a seal is required by law, and the seal is not *specific*, either wax, wafer or ink, otherwise called a *scrawl*, shall be sufficient.⁽²⁾

95. But in Missouri it is held, that the instrument must show an intention to make a specialty. So in Virginia,^(c) Texas and Alabama.^(d) Thus a writing which concludes, "as witness his hand," is not a deed, though a scroll, purporting to be a seal, is annexed. In New Jersey, the rule is limited to pecuniary obligations. In Illinois, it is held, that the party may sign against a scroll previously printed.⁽³⁾

96. In Connecticut, a statute gives validity to all past unsealed conveyances. A very late act makes the same provisions as to conveyances made out of the State, with a saving of all suits then pending.⁽⁴⁾

97. It is held, in New Hampshire,^(e) that if a suit is brought in a State where the above substitute for a seal is not allowed, upon an instrument made in one of the States where it is allowed; the form must be *assumpsit*, and not *covenant*. So if it is made payable in a State where such form is not allowed. But in New York it has been held, that *debt* lies upon an instrument thus executed in Pennsylvania.⁽⁵⁾

98. Whether a writing is *under seal* or not, is a question to be determined on inspection by the court.⁽⁶⁾ It must be determined by the fact, whether the party affixed a seal; not by his assertion in the body of the instrument, or the attestation.⁽⁷⁾ (See sec. 92.)

(1) Warren v. Lynch, 5 John. 239; Duncan v. Duncan, 1 Watts, 327; McDill v. McDill, 1 Dall. 63; Long v. Ramsay, 1 Ser. & R. 72; 4 Kent, 452; Walk. 354; Misso. St. 118; Jones v. Logwood, 1 Wash. 42; Trasher v. Everhart, 3 Gill & J. 234, 246; 2 Blac. 322; U.S. v. Stephenson, 1 McL. 462; Sneed v. Ward, 5 Dana, 188. See Mason v. Brock, 12 Illin. 273.

(2) Michener v. Kenney, Wright, 459; Ib. 214; Ohio St. 1831, 349.

(3) Boynton v. Reynolds, 3 Misso. 79; Cartmill v. Hopkins, 2, 20; Lee v. Adkins, 1 Minor,

187; Overseers, &c. v. Overseers, &c., 1 Halst. 169; Austin v. Whitlock, 1 Munf. 487; Anderson v. Bullock, 4 Munf. 442; Ankeny v. McMahon, 3 Scam. 13; Flemming v. Powell, 2 Tex. 225.

(4) Con. St. 1836-7, 73; Ib. 1845, 36.

(5) Meredith v. Hindsdale, 2 Caines, 362; Douglass v. Oldham, 6 N. H. 150. (But see Warren v. Lynch, 5 John. 245.)

(6) Duncan v. Duncan, 1 Watts, 322.

(7) Trasher v. Everhart, 3 Gill & J. 246. But see Force v. Craig, 2 Halst. 274.

(a) All instruments importing on their face to be sealed instruments, even though without a scrawl, are now regarded as specialties or deeds. Clay's Dig. 158. Under the statutes of Florida, a scrawl, with the word seal written in it, affixed to a name; is effectual as a seal. Comerford v. Cobb, 2 Florida, 418.

(b) As to the policy in this change in the law, see Meredith v. Hindsdale, 2 Caines, 262; 4 Kent, 452, 453.

(c) An instrument purporting to convey land, with a scroll attached to the grantor's name, though the scroll is not recognized in the body of the instrument, will be held to be a deed, where the instrument has been acknowledged in court by the grantor as his deed, for the purpose of having it recorded. Ashwell v. Ayres, 4 Gratt. 283.

(d) Otherwise in Maryland, 3 Gill & J. 246.

(e) In this State, a distinct impression of the seal upon paper is sufficient, without wax or wafer. Carter v. Burley, 9 N. H. 558.

99. A *common seal* is one of the incidents of a corporation, by which its proceedings are authenticated and proved to be corporate acts. But, if such seal is affixed by one pretending to be an officer, but having no authority to do it, it is not the corporate seal.(1)(a) Although a corporation, according to the modern doctrine, may do most acts *by vote*, they can convey land only by a sealed instrument.(2)

100. The seal of a corporation must be proved, to render its deed effectual; not necessarily by one who saw it affixed, but by one who knows its motto, device, &c. But, it is said, the seal of a corporation upon a deed is *prima facie* evidence that it was affixed by authority; especially if affixed by the officer having custody of the seal.(3)

101. The English statute of frauds, (29 Cha. II, c. 3.) requires all conveyances to be made by some writing signed by the party. Similar acts have been passed in all the States of the Union. Signing has now become the material part of the execution of a deed.(4)

102. *Delivery* is another circumstance essential to the validity of a deed; which takes effect from its delivery, not from its date.(b) And this ceremony may supply the place of the formal execution required by law. Thus, if another person seal the deed; by delivering it as his deed, the grantor adopts the seal, and gives effect to the grant. It has been suggested that the signing may be adopted in the same way. But this seems repugnant to the statute of frauds. The universal practice is, for the grantor to sign the deed, and acknowledge the seal as his.(5)

103. Where a deed, though duly executed and acknowledged, is retained by the grantor, with the grantee's consent, as security for the consideration, this is no delivery or acceptance, and nothing passes. But, if he declares before the attesting witness that he delivers the deed, it is effectual, though he retain possession, and his subsequent declarations are inadmissible to control the delivery, if unconditionally made.(6)

103 a. Voluntary deed to a trustee by a woman before marriage. The *cestui* and trustee were not present, and the deed was not delivered,

(1) Lessee, &c. v. Barr, 1 Ohio, 394.

(2) London, &c. v. Bailey, 4 Bing. 283.

(3) Leazure v. Hillegas, 7 S. & R. 313; Lovett v. Steam, &c. 6 Paige, 54.

(4) McDill v. McDill, 1 Dall. 64.

(5) Goddard's case, 2 Rep. 4 b; Cromwell v. Grunsden, 2 Salk. 463; 2 Bl. Com. 307; Jackson v. Phipps, 12 John. 418; 6 Cow. 617;

4 John. 230; Harrison v. Trustees, &c., 12 Mass. 463; Jackson v. Leek, 12 Wend. 105; Fish v. Gordon, 10 Verm. 288; Whitlocke v. Fiske, 3 Edw. 131; Goodson v. Whitfield, 5 Ired. Equ. 163; Ferguson v. Miles, 3 Gilm. 358. (6) Jackson v. Dunlap, 1 John. Cas. 114; Doe v. Knight, 5 Barn. & C. 671; Younge v. Moore, 1 Strobb. 41.

(a) In North Carolina, it is provided that the deed of a corporation shall be sealed with its seal, signed by the president, or presiding member and trustee, and two members or trustees thereof, and have two witnesses. 1 N. C. Rev. St. 118. In Kentucky, a corporation, as well as an individual, may use a scroll instead of a seal. Reynolds v. Glasgow, 6 Dana, 38.

(b) A voluntary deed never parted with, and the purpose of which has never been completed, is regarded in equity as an imperfect instrument. Cecil v. Butcher, 2 Jac. & W. 573. See Utterbach v. Binns, 1 McL. 243; Hammell v. Hammell, 19 Ohio, 17.

Delivery of a deed is a question of fact. Lindsay v. Lindsay, 11 Verm. 621; Hannah v. Swarner, 8 Watts, 9. But what amounts to final delivery and acceptance, is a question of law. The general question, therefore, is a mixed one of law and fact, to be left to the jury, under direction of the court. Earle v. Earle, 1 Spencér, 347. *Recording* is no substitute for delivery, but merely a statutory addition to the common law requisites, of which delivery is one. It is only evidence of delivery. Its purpose is, not to perfect, but to publish, the deed; not to pass the property, but to give public notice that it has already passed. Dawson v. Dawson, Rice, 243.

but destroyed by the grantor, and no publication made of its contents, but the grantor required the witnesses to sign without reading it, in order that they might not publish it. Held, there was no delivery, and the title did not pass.(1)

104. The deed of a corporation need not be delivered, The affixing of the corporate seal is of itself sufficient. Such sealing makes the contract of a corporation a specialty. And delivery to the agent of a corporation is a delivery to them.(2)(a)

105. If a dean and chapter seal a deed, it is their deed immediately; but if they, at the same time, give a power of attorney to deliver, it is not their deed till delivery.(3)

106. No particular form is necessary to the delivery of a deed.(b) This may consist in an act without words, or in words without any act. Slight circumstances are sufficient to be left to the jury. Thus, where the deed lies upon a table, and the grantor says to the grantee, "go and take it up, it is sufficient for you," or, "it will serve your turn," or, "take it as my deed;" or where he holds it out and says, "here is your bond, what shall I do with it," though it never comes into the hands of the obligee; this is a good delivery.(c) So, where the deed,

(1) Wood v. Ingraham, 3 Strobb. Equ. 105. | 15 Wend. 256; Western, &c. v. Babcock, 6

(2) Cro. Eliz. 167; Clark v. Woollen, &c., | Met. 346.

(3) Co. Lit. 36 a, n. 5.

(a) Thus, a delivery to the trustees, in a deed of assignment by a bank for the benefit of its creditors, is equivalent to a delivery to the *cestuis que trust*. Ingraham v. Grigg, 13 Sm. & M. 22.

(b) "There is nothing mysterious in the law on this subject, nor anything magical in the formal delivery of a deed from the hand of the grantor to the hand of the grantee. If, without any form or ceremony, it reaches the possession of the grantee, by the consent of the grantor, it is sufficient." Porter v. Cole, 4 Greenl. 25. It has been held, that in case of a deed to two persons and a delivery to only one, nothing being said of the other, the deed as to the latter is void. Hannah v. Swarner, 8 Watts, 9. Acceptance as well as delivery is necessary. Wiggins v. Lusk, 12 Illin. 132. It is said, more looseness is allowed between father and son in this respect than in ordinary cases. Brown v. Brown, 1 W. & Min. 125; Bryan v. Wash, 2 Gilm. 557.

To constitute delivery, the grantor must part, not only with the possession, but with the control of the deed, and deprive himself of the right to recall it. [Per HALSTED, Ch.] Commercial Bank v. Reckless, 1 Halst. Ch. 430. But see same case, lb. 650.

Whether a deed, duly executed and attested, has been delivered, is a matter not conclusively settled by the fact, that the deed is found in the possession of the grantee, or by the certificate of acknowledgment in the usual form. Den v. Farlee, 1 New Jersey, 279.

After evidence of admissions of the grantor, from which the delivery might be inferred, it is competent to show, that he was subsequently in possession of the deed, and deposited it with a third person, subject to his control; and his directions to the depository at the time. Ib.

(c) A, the grantor in a deed, upon signing it, laid it before B, the grantee, saying, "there is no go back from that," and the witnesses then attested it. A note, made for the consideration, was not handed to A, but both papers were taken up by B, and the parties went to a magistrate, in order that he might take the acknowledgment, which was accordingly done; but A withheld the deed from B, who did not then assent or claim that it had been previously delivered. B brings a bill in equity against A to obtain possession of the deed, in his answer to which, A denies any delivery. Held, a delivery was not proved. Mills v. Gore, 20 Pick. 28. The statement, that "the execution of a certain deed was proved," implies that *prima facie* evidence was offered of delivery. And, if the grantee produce the deed, and prove long possession under it, this is a confirmation of such *prima facie* evidence. Ross v. Durlam, 4 Dev. & B. 58. But where there is no delivery at the time, and the possession of the grantee, long subsequent, is otherwise accounted for, it is not even evidence of delivery for the jury. 4 Dev. & B. 338.

A deed was executed by husband and wife in favor of her mother, and left in possession of the daughter for her mother, but was afterwards found mutilated, the names of the grantor and witnesses being cut out. This was done by the grantor. Held, as between the parties,

being duly executed and read, in presence of the grantee, is not taken away by him, but left behind at the place of execution, this is a sufficient delivery in law. (a) Proof of the handwriting of a deed, added to its being in possession of the grantee, or a purchaser from him, is *prima*

the effect of the deed was the same, as if it had been always in the grantee's possession. *Frost v. Peacock*, 4 Edw. Ch. 678.

Where a deed from a father to trustees, in trust for his daughter, was signed and sealed by the grantor, in the presence of witnesses, but the attesting clause did not state that it was delivered; and the grantor retained the same in his possession nearly four years after its execution, and until the time of his death, without disclosing its existence, either to the trustees, or to his daughter, the *cestui que trust*, in the meantime, treating the property as his own, and altering his will, so as to increase a previous devise to his daughter, to an amount nearly double the value of the property conveyed; and, after his death, the deed was found in a bureau belonging to the grantor, among his clothes, and was then proved by one of the subscribing witnesses, and recorded; held, such deed was void and inoperative as a deed of bargain and sale, for want of a valid delivery, and also as a voluntary settlement. *Roosevelt v. Carow*, 6 Barb. 190.

So, where a deed, after acknowledgment, was retained by the grantor, and found among his papers after his death; held, a delivery after his death would not give it effect. *Wiggins v. Lusk*, 12 Illin. 132.

If a third person falls sick, to whom a deed has been delivered, and the grantor takes back the deed for safety and dies, leaving it among his papers, from which it is taken by the grantee and recorded; the original delivery is still valid. *Brown v. Brown*, 1 W & Min. 325.

Where the grantor is as much or more interested in the preservation of a deed than the grantee, the fact of its being found in his possession does not raise any presumption whether delivery was intended at the time of its execution. *Blakemore v. Byrnside*, 2 Eng. 505.

To render the leaving of a deed by the grantor with the clerk, for registry, and the registration thereof, a good delivery to the grantee, it must be left for the grantee, or with such directions from the grantor as to amount to a delivery, and authorize the grantee to take it from the clerk. Per Halsted, Ch.; *Commercial, &c. v. Reckless*, 1 Halst. Ch. 430; *Ib.* 650.

The possession of a mortgage, obtained from the clerk's office by the person named therein as mortgagee, without the consent of the mortgagor, and after he had refused to deliver the bond, to secure which the mortgage was drawn, is no evidence of the delivery of the mortgage. *Ib.*

A deed may be good, though recorded before delivery. *Parker v. Hill*, 8 Met. 447. But delivery must precede acknowledgment. *Ford v. Gregory*, 10 B. Mon. 175.

Recording is not conclusive evidence of delivery. The grantee may reject the deed after recording, if not previously accepted. *Juvenal v. Jackson*, 2 Harr. (Penn.) 519.

Where a deed had been recorded, and the grantee died in possession, having recently obtained it by an action of forcible detainer; held, *prima facie* proof of delivery, and that the effect would be the same, though the grantor alone procured the recording. *Hammell v. Hammell*, 19 Ohio, 17.

A deed was drafted and attested by a witness and executed in his presence, and was seen by him in the hands of the grantee, by whom it was afterwards delivered to the witness, to procure its proof before the proper officer. There was no evidence of its being proved, or of the grantee's declaring his acceptance of it. Held, a good delivery. *Rose v. Rose*, 7 Barb. 174.

Where a bill in equity sought to recover slaves, and alleged that the deed for them to the plaintiff's wife was signed and sealed by her father, to whom they belonged, but was never actually delivered, although it was duly proved and registered at the instance of the father; held, these facts amounted to a delivery of the deed, and a conveyance of the legal title, so that the plaintiff's remedy was at law, and not in equity. *Ellington v. Currie*, 5 Ired. Eq. 21.

Where a deed was executed with the usual formalities, acknowledged by the grantor before a judge, and put on record by the grantor's orders, but was never delivered in fact, and it never was the grantor's intention to deliver it, except on a contingency that never happened; held, the deed was void for want of delivery. *Jones v. Bush*, 4 Harring, 1.

(a) So, though several seals are attached, without signatures. *Williams v. Springs*, 7 Ired. 334.

facie but not conclusive evidence of sealing and delivery. The fact of delivery need not appear upon the face of the deed.(1)

107. So, where a deed is signed by both parties, and acknowledged, but not formally delivered, and it is found among the grantor's private papers after his death; this is a sufficient delivery. And, in a late English case, where A executed a mortgage to B, his creditor, without communication with the latter, retained the deed for 12 years, and after his death it was found in a chest with his title deeds; held, the deed took effect from its delivery, even against creditors.(2) If a deed is found in the grantee's possession, delivery is presumed, because then, and not otherwise, it would be in the proper custody.(3)(a)

108. So, the delivery of a deed at the register's office, to be recorded in the absence of the grantee, is a good delivery to him, if he afterwards assent to and receive the deed.(4)(b)

109. The registry of a deed does not amount to a delivery, where there appears to be no assent on the part of the grantee, nor any knowledge that the deed has been executed in his favor. Such registry is said not to be an absolute delivery, but only evidence of it, for the jury.(5)

110. But the delivery of a deed, duly executed and acknowledged, to the register, aided by a subsequent possession of the deed by the grantee, might be evidence of a delivery to him.(6)

111. A agreed with B to convey certain land to him and accordingly left a deed with the register. After the grantee's death, he sent the deed to his son and heir. Held, no delivery. But where an heir delivers a deed after the grantor's death, which was left by the grantor as an escrow, the deed is valid as to such heir (in equity).(7)

112. Two days before an attachment of certain land, A, the owner, employed the register of deeds to draw a deed of it, executed the deed

(1) *Sowerby v. Arden*, 1 John Cha. 250; *Williams v. Springs*, 7 Ired. 384; *Collins v. Bankhead*, 1 Strobb. 25; 4 Ohio, 74; Co. Lit. 36 a; *Thoroughgood's case*, 9 Rep. 136; *Hale v. Hills*, 8 Conn. 39; *Byers v. McClanahan*, 6 Gill & J. 250; *Goodrich v. Walker*, 1 John. Ca. 250; *Fowler v. Fowler*, 3 Conn. 348; *Shelton's case*, Cro. Eliz. 7; *Folly v. Vantuyt*, 4 Halst. 153; *Lessee, &c. v. Davis*, 6 Pet. 124; *Grellier v. Neale*, Peake, 146; *Talbot v. Hodson*, 7 Taunt. 251; *Hal-luck v. Bush*, 2 Root, 26; *Goodright v. Gregory*, Loft, 339; *Clayton v. Laerman*, 4 Dev. & B. 238; *Waddell v. Hewitt*, 1 Ired. Equ. 475; *Rigler v. Leland*, 2 Harr. 361; *Southern, &c. v. Cole*, 4 Flori. 359; *Chandler v. Temple*, 4 Cush. 285; *Harris v. Saunders*, 2 Strobb. Equ. 370; *Floyd v. Taylor*, 12 Ired. 47; *Chandler v. Temple*, 4 Cush. 285.

(2) *Schrugham v. Wood*, 15 Wend. 545; *Exton v. Scott*, 6 Sim. 31.

(3) *Flagg v. Mann*, 2 Sumn. 487; *Chandler v. Temple*, 4 Cush. 235.

(4) *Harrison v. Trustees, &c.*, 12 Mass. 456; *Hatch v. Hatch*, 9, 307; *Chapel v. Bull*, 17, 213; *Rathbun v. Rathbun*, 6 Barb. 98; *Ar-rison v. Harmstead*, 2 Barr, 191; *Burt v. Cas-sety*, 12 Ala. 734.

(5) *Maynard v. Maynard*, 10 Mass. 456; *Her-berth v. Herbert*, 1 Bree, 282; *Chess v. Chess*, 1 Penn. 32; *Gilbert v. North, &c.*, 23 Wend. 43; *Ingraham v. Grigg*, 13 S. & M. 22.

(6) *Ib.*; (*Beers v. Broome*, 4 Conn. 247; *Dawson v. Dawson*, Rice, 243.)

(7) *Jackson v. Phipps*, 12 John. 418; *Keirsted v. Avery*, 4 Paige, 9.

(a) Upon the same principle, if found in possession of the grantor, the presumption is, that it was not delivered. *Hatch v. Haskins*, 5 Shepl. 391.

(b) It has been ingeniously contended, that, under an act providing that deeds executed and recorded shall pass lands, the recording is itself equivalent to livery of seizin, or is a delivery of the deed. But the argument was overruled. 1 Penn. 42. A marginal note, made by the Register of Deeds, after registration, that there was no delivery, but the deed was recorded by mistake, will not affect its validity. *Foster v. Duzan*, 8 Ohio, 87. Delivery to the register, without knowledge of the grantee, is insufficient. *Wiggins v. Lusk*, 12 Illn. 132.

and left it to be recorded, as the register understood for the use of B, the grantee; and it was recorded one day before the attachment. The register handed the deed to C, the brother of B, two days after the attachment, and B requested C to go and take it for her two or three days before he did so. A also told C, on the day of executing the deed, that he had done it, and requested him to call at the office, and get the deed for B. On the same day, he also told D in B's presence, that he had given her a deed. Held, these facts showed B's assent prior to the attachment, and the deed should have precedence.(1)

113. A executed a deed to B, and sent it to the registry of deeds to be recorded, declaring that his object was to save the land from being taken for an unjust debt. B did not know of the deed till after A's death. Held, no delivery.(2)(a)

114. Where a father made a deed to his son without the knowledge of the latter, and handed it to a stranger to be delivered to the grantee after the grantor's death, which was accordingly done; held, a valid conveyance.(3)

114 a. A deed to a granddaughter, an infant, was placed in the hands of her father, to be kept till she came to years of discretion. Held, the estate passed to her, on execution of the deed.

115. The rule upon this subject has been thus stated in New York. A deed may be delivered to a third person for the grantee, whether he be expressly authorized to receive it or not. But if not authorized, the delivery is invalid, unless accompanied by a declaration of its purpose for the benefit of the grantee.(4)

116. It is not essential to the immediate operation of a deed, that it be put directly into the hands of the grantee; but the grantor must part with it, by putting it into a course of transmission or delivery. The depositing of a deed in the post-office, directed to the grantee, is as effectual as delivery to a messenger.(5)

117. A deed of gift to a wife is delivered, if accepted by the husband.(6)

118. The grantors in a deed having executed it, it was delivered to one by the consent of the others, subsequently found in possession of the grantee's agent, and by him placed in the registry for record. At the trial, it was in possession of the grantee's counsel, and its delivery objected to, not by a party to the deed, but by a stranger. Held, from the facts, the jury might presume a delivery.(7)

119. Where a release of a covenant has been indorsed by the covenantor upon the agreement, and remains with him, it may be good with-

(1) *Hedge v. Drew*, 12 Pick. 141.

(2) *Barus v. Hatch*, 3 N. H. 304.

(3) *Hatch v. Hatch*, 9 Mass. 307; *Bryan v. Wash.*, 2 Gilm. 557.

(4) *Touch*. 57; *Church v. Gilman*, 15 Wend.

656; (5 B. & C. 671; *Buffum v. Green*, 5 N. H. 71.

(5) *McKinney v. Rhoads*, 5 Watts, 343; *Rigler v. Cloud*, 2 Harr. (Pen.) 361.

(6) *Brackett v. Wait*, 6 Verm. 411.

(7) *Gardner v. Collins*, 3 Mas. 398.

(a) Agreement for the sale of land, at so much per rod. A deed was made out, but, the land not having been measured, was not acknowledged and delivered; but the grantor afterwards acknowledged it, and sent it to the registry without the grantee's knowledge. Before acceptance of the deed by the latter, a creditor of the grantor attached the land, and afterwards levied an execution upon it. Held, his title should prevail over the grantee's. *Samson v. Thornton*, 3 Met. 275.

out delivery; or else delivery will be presumed, and that he kept possession by consent of the covenantor.(1)

120. The mere reading of a deed is not a delivery, but only evidence of it.(2)

121. Evidence having been offered to prove a delivery, it was proposed to show in reply, that the grantee, a few days before the alleged delivery, broke open the grantor's trunk, and on presenting papers to the grantor was ordered to put them back, and not meddle with them. Held, inadmissible evidence, as furnishing no answer to that upon the other side.(3)(a)

122. So evidence is inadmissible, to prove delivery, that, after making the deed, the grantor declared his intention to deliver it, and that the grantee, soon after the making of the deed, took possession of the land with the grantor's consent, and continued it till the grantor's death.(4)

123. Where A, the grantor, being a partner of B, the grantee, after executing the deed, handed it to B, to be put into a trunk, which contained their joint papers, the key of which was always kept by A, and was returned to him as soon as the deed had been put in; held, no delivery, the grantor merely availing himself of the hand of the grantee, to put the deed in a place which was entirely within his own control.(5)

124. So, where a grantor had previously contracted to give a deed, and actually executed one in presence of the grantee, but the latter took and carried it away without his consent; held no delivery.(6)

125. Where a grantee obtains possession of the deed without the grantor's assent, but the latter afterwards accepts the price; this is a ratification which amounts to a delivery. So a suit and judgment for the price.(7)

126. Where a deed appeared to be more than 30 years old, and the only witness testified, that he attested it in the presence of the parties, but nothing further, and the deed was afterwards in possession of the grantee; held, sufficient proof of execution and delivery.(8)

127. There cannot be two valid deliveries of the same deed. And the principle applies to *voidable deeds*. Thus, if an infant, or one under duress, deliver a deed, and redeliver it after removal of the disability; the latter delivery is invalid. But it is otherwise with a deed absolutely *void*. Thus, if a married woman, after her husband's death, redeliver a deed made during coverture, the second delivery is good.(9)

(1) *Fitch v. Forman*, 14 John. 172.

(2) *Chess v. Chess*, 1 Penn. 43.

(3) *Hale v. Hills*, 8 Conn. 39.

(4) *Ib.*

(5) *Chadwick v. Webber*, 3 Greenl. 141.

(6) *Woodman v. Coolbroth*, 7 Greenl. 181.

(7) *Porter v. Cole*, 4 Greenl. 20.

(8) *Lawry v. Williams*, 1 Shepl. 281.

(9) *Perk.* 154; *Touch.* 60; *Co. Lit.* 48 b; *Stephens v. Eliot*, *Cro. Eliz.* 484; *Verplank v. Sterry*, 12 John. 536.

(a) A grantee fraudulently obtained the deed and conveyed to purchasers without notice, who entered and occupied for several years. Held, they should be allowed for improvements. *Utterback v. Binns*, 1 McL. 243. Where a deed is left with a grantee only for the purpose of sending it to a third person, who is to keep possession of it till performance of a certain act; this is no delivery. *Gilbert v. North, &c.*, 23 Wend. 43.

So if a deed is executed and acknowledged, but a blank left for the grantee's name, and the deed is afterwards taken from the house of the grantor, fraudulently, and the blank filled; even a *bona fide* purchaser from the nominal grantee gains no title; especially if the first grantor remain in possession. *Van Amringe v. Morton*, 4 Whart. 382.

128. The date is a mere formal part of the deed, and is *prima facie*, but not conclusive evidence of the time of delivery; which may be shown by evidence *aliunde*. And the subsequent acknowledgment of the deed does not change this presumption.(1)

129. Where the date, and the time of delivery, of a deed, do not correspond, the latter controls the former, if the justice of the case so require. The rule of the English law, that the parties cannot prove delivery upon a day subsequent to the date, is founded upon the wording of the statute of enrolments, which requires enrolment within six months from *date*. It has been said, that the real date of a deed is the time of its delivery.(2)(a)

130. In a suit for the purchase-money of land, the vendor may offer a deed in evidence, though the fact of a tender or delivery is disputed. The question is for the jury.(3)

131. A deed may be delivered, not absolutely, to the grantee himself, but conditionally, to a stranger, to be given up to the grantee, on his performing a certain condition. Such instrument is termed in law *an escrow*, meaning a *scrawl* or writing. *An escrow* is said to be a conditional delivery of an obligation, to take effect on the happening of some event consistent with the instrument; not a condition of delivery repugnant to the contract, and varying its terms. The original delivery of such instrument is termed *traditio inchoata*;(b) and the subsequent fulfilment of the condition, *consummatio existens*. That an instrument was delivered as an escrow, may be proved by the circumstances of the case.(4)

132. An escrow can never take effect as a deed, till performance of the condition, even though the grantee obtain possession of it before such performance. Nor does it give color of title to his possession, if finally rejected by him. But possession by him is *prima facie* proof of performance. If either party die before performance, it may still take effect by a subsequent fulfilment of the condition. If the grantor, at the time of executing the instrument, has not legal ability to convey, but, before the second delivery, acquires such ability, the deed is still void.(5)(c) (See sec. 139.)

(1) Hall v. Benner, 1 Penn. 402; Cutts v. York. &c., 6 Shepl. 190; Ford v. Gregory, 10 B. Mon. 175; M'Kenzie v. Roper, 2 Strobb. 306.

(2) Fairbanks v. Metcalf, 8 Mass. 240; Lee v. Mass. &c., 6, 219; Hatch v. Hatch, 9, 307; Hardenberg v. Schoonmaker, 2 John. 230; Jackson v. Bard, 4, 230; Jackson v. Hill, 5 Wend. 533.

(3) Allen v. Getz, 2 Penn. 310; Masterson v. Marshall, 5 Dana, 417.

(4) Carr v. Hoxie, 5 Mas. 60; Baldwin v. Potter, 2 Root, 81; State v. Perry, Wright, 662; Sparrow v. Smith, 5 Conn. 116; 3 Rep. 35 b; Wolcott v. Coleman, 1 Conn. 375; Bowker v. Burdekin, 11 Mees. & W. 128; Grugeon v. Gerrard, 4 Y. & Coll. 119; Evans v. Gibbs, 6 Hump. 405.

(5) Touch. 59; 3 Rep. 35 b; Arnold v. Patrick, 6 Paige, 314-15; Hare v. Horton, 5 Barn. & Adol. 715; Chaaten v. Philips, 11 Ired. 255.

(a) Where a patent contains two dates, the latter will be taken for the true one, and another patent intervening between the two will have priority. McGowan v. Crooks, 5 Dana, 67.

(b) It is so far void (as a deed) that delivery as an escrow may be proved under *non est factum*. Stoytes v. Pearson, 4 Esp. 256.

(c) The condition, upon which the instrument is to take effect, must be *literally* fulfilled. Thus, where the grantee was to give bond for the support of a third person, and such bond was not given, though the support had been furnished, and the person had died; held, the deed did not take effect. Human v. Booth, 21 Wend. 267.

Where a deed executed by a husband and wife is deposited as an escrow, to be delivered

133. Where an instrument is delivered to a third person, on condition, as *the deed* of the grantor, the former holds it *in trust* for the grantee. The title is not consummate till the grantee receives the deed; but performance of the condition is not necessary to complete it, nor can the grantor plead *non est factum*.(a) Whether an instrument is delivered to a stranger as *a writing*, or *escrow*, or as *a deed*, is a question of fact, to be settled by inspection of the instrument, and the testimony of the third person, or the grantee himself, (and other evidence.) No precise form of words is necessary to make it an escrow. Formal execution, delivery and acknowledgment for the use of the grantees, and a memorandum of the stranger, upon the wrapper, calling the papers *deeds*, to be kept till the grantor's death and then delivered, are facts favoring their operation as deeds. While a contrary construction is favored by the testimony of the stranger, that the papers were delivered to him as *escrows*, because the grantor was to have the use of the land for his life, and some of the grantees were minors.(1)

134. In New York it has been held, that a grantor's declaration, in placing the instrument in a third person's hands, that he delivers it *as his deed*, is only matter of evidence, to be considered in connection with other circumstances.(2)

135. A made a deed of land to B, for the express consideration of \$1,500, and handed it to C, for the purpose of taking it to B, and proposing to him to pay the consideration and accept the deed. C took the deed to B, a man of large property, and B acceded to the proposal, and received the deed, and in two or three days paid and secured the price, as proposed. Held, the instrument was an escrow, and took effect as a deed only when delivered to B.(3)

136. A deed was placed in the hands of referees, to be delivered by them if their report should be accepted. Before return of such report, one of them delivered the deed in presence of the grantor, who did

(1) Co. Lit. 36 a, n. 6. (Amn. edn.;) Perk. Mass. 452-3; White v. Bailey, 14 Conn. 271.
 137-8-142-3-4; Bushell v. Pasmore, 6 Mod. See Gaskill v. King, 12 Ired. 211.
 217-18; Wheelwright v. Wheelwright, 2 (2) Clark v. Gifford, 10 Wend. 310.
 (3) Sparrow v. Smith, 5 Conn. 113.

on the performance of a condition, the husband's consent to the delivery, without performance of the condition, will bind the wife. Ackert v. Pultz, 7 Barb. 386.

Where a grantor delivers a deed to his agent as an escrow, and the agent delivers it to the grantee without a performance of the condition, this does not avoid the deed as against a *bona fide* purchaser from the grantee without notice of the condition. Blight v. Schienck, 10 Barr, 285.

So, where a grantor executes and acknowledges a deed before a magistrate, which had been left there for that purpose by the agent of the grantor and grantee, and leaves the instrument with the magistrate without instructions, the delivery is absolute; notwithstanding instructions given to the agent, on the next day, not to deliver the deed until payment of the purchase-money. And where a *bona fide* purchaser from the grantee, who obtained the deed without performing such condition, has intervened, the burden of showing that there was no absolute delivery, is on the grantor. Ib.

(a) Chancellor Kent says, "the distinction on this point is quite subtle, and almost too evanescent to be relied on." 4 Kent, 454, n. But see 5 Barn. & Cr. 671; Hall v. Harris, 5 Ired. Eq. 303.

Where a father conveyed land to his son for services and affection, and took back a lease for life, but did not wish to have them recorded till after his death, in order to keep the knowledge of them from his wife and the public; the deed was held to be well delivered, though lodged with a third person, under the above arrangement. Brown v. Brown, 1 W. & M. 325.

not object. The report was afterwards rejected. Held, a good delivery.(1)

137. A *defeasance* was lodged with a third person, under an express condition that it should not be delivered to the obligee unless a specified sum of money was paid within three years. The money was not paid, and the defeasance was returned to the obligor. Held, the conveyance from the obligee remained, as at first, absolute.(2)

138. A sheriff deposited with the prothonotary (in Pennsylvania,) a deed of land sold on execution, as an escrow, to be delivered to the purchaser on payment of the price. The purchaser, without payment, moved for leave to take the deed from the office, which was refused. Ten years afterwards, he renewed the motion, and was suffered to take the deed, on the ground that he had a lien upon the land sold, the extinguishment of which was equivalent to payment of the price. Held, the deed was not delivered, and the purchaser gained no title.(3)(a)

139. It is said, that where one delivers a deed as an escrow, who has no legal capacity at that time to make a deed, but before the second delivery acquires such capacity, the deed is void. But where a party at the first delivery has a legal capacity to contract, but cannot perfect the contract till an impediment is removed, if such removal take place before the latter delivery, the deed is good. There are many instances which illustrate this principle.(4) (See sec. 132.)

140. If a woman, being sole, delivers an instrument as an escrow, and, before a second delivery, marries and dies; upon such second delivery, the deed shall take effect *by relation* from the first, as it would otherwise be void. So where a person becomes *non compos* before the second delivery. So where the grantor dies before such second delivery. And, it is said, that though by the death of the obligor or obligee in a bond, delivered as an escrow, *a second delivery is rendered impossible*; yet it is the deed of the obligor from the first delivery, and is deemed consummate by performance of the condition.(5)

141. A deed was delivered to a third person to keep, and *if not called for*, to deliver after the grantor's death. Held, it became the deed of the grantor presently; that the depositary held it in trust for the grantee; that the title of the grantee became consummate by the grantor's death; and the deed took effect, by relation, from the first delivery. It was also said, that, in one respect, the deed was like *a devise*; being revocable.(6)

142. A person conveyed lands to his children, and placed the deed

(1) Porter v. Cole, 4 Greenl. 20.

(2) Bickford v. Daniels, 2 N. H. 71.

(3) Robins v. Bellas, 2 Watts, 359.

(4) Touch. 59; Butler and Baker's case, 3 Rep. 35 b; * Perk. 139-40; Brook's Read.

150; Perryman's case, 5 Co. 85; Wheelwright v. Wheelwright, 2 Mass. 454.

(5) Ib. 300; Graham v. Graham, 1 Ves. jun. 275; Ruggles v. Lawson, 13 John. 285.

(6) Belden v. Carter, 4 Day, 66.

* Lord Coke says, this case was argued twenty-one times.

(a) A deed was sent in a letter to A, who was not the agent of the grantee, to be delivered to the latter upon payment of the price; but was not stated in the letter to be an *escrow*. Held, the grantee acquired no title till delivery to him or payment. White v. Bailey, 14 Conn. 271.

A school district appointed a committee of three to procure and receive a deed of land. The deed was made and deposited with one of the committee, with orders to deliver it on payment of the price—not otherwise. The district received the deed of him, and voted to accept and record it, but made no payment. Held, the deed was never delivered. Rhodes v. Gardiner, 30 Maine, 110.

in the hands of one of them, to be delivered to them on his death, which was accordingly done. The instrument was not executed with the requisite formalities of a devise. Held, it was a deed, not a devise, taking effect from the first and only delivery, and consummated by the grantor's death.(1)(a)

143. It is very justly remarked by Sewall, J., that the distinction between delivery to a stranger *as a writing*, and delivery *as a deed*, is rendered almost nominal, by those decisions which give effect to an escrow *from the first delivery*, where the intention so requires. Another principle worthy of notice is, that, even where no special circumstances require this latter construction, it is so far adopted, that an intermediate conveyance by the grantee, between the first and second deliveries, vests a good title in his grantee after the second delivery.(2)(b) So, the title deeds vests in the grantee, as against an intermediate pawnee of the grantor.(3)

144. Where a sheriff's deed is delivered as an escrow to the plaintiff's attorney, to be delivered by him to the purchaser, upon payment of the price; until such second delivery, the estate remains in the debtor.(4)

145. A deed may be placed in the hands of a third person, in such way as to make it neither the present deed of the party, nor an escrow. Thus, where a witness testified that the grantor executed a deed, and the grantee a mortgage back, in his presence; that they then talked of certain conditions, to be performed before the deeds were passed, and concluded to leave them both with him, but gave him no authority in

(1) *Stewart v. Stewart*, 5 Conn. 317. See *Harris v. Saunders*, 2 Strobh. Equ. 370.

(2) *Hatch v. Hatch*, 9 Mass. 310.

(3) *Beekman v. Frost*, 18 John. 544.

(4) *Jackson v. Catlin*, 2 John. 248.

(a) If a deed is not delivered, but remains with the grantor till his death, and he designed it for a testamentary instrument; it is void. *Stillwell v. Hubbard*, 20 Wend. 44.

But where A made a deed to B, his son, and delivered it to C, with instructions to deliver it to B after A's death, and not before, unless both parties so required, and after A's death it was delivered to B; held, it took effect by relation from the making, and that an intermediate conveyance by B, though under the wrong description of his "right of expectancy," passed the estate. *Hooker v. Pierce*, 2 Hill, 650.

So, where A made a deed to B, his grandson, which was placed in the hands of C, with instructions to keep it during A's life, and then deliver it to some person, to be kept for B; and, upon the death of A, C went before the proper officer, proved the deed as a witness, and left it with the officer for B; held, the title passed. *Goodell v. Pierce*, 2 Hill, 659; acc. *Foster v. Mansfield*, 3 Met. 412.

After signing a deed, the grantor said—"this is my last act and deed." He then desired a third person to keep it, and not deliver it to the grantee till he should be dead. The grantee was not present. In an action brought after the grantor's death, held, there was a legal delivery. *Doe v. Bennett*, 8 Carr. & P. 124.

An instrument conveying slaves, and importing an absolute gift upon its face, and duly recorded, with a condition that, if the grantee should die before the grantor, the property should revert, and with a proviso, that the grantee should pay to each slave two dollars per month during their natural lives, is not a testamentary paper, but a deed; and it creates an absolute estate in the slaves upon a condition subsequent. *Spalding v. Grigg*, 4 Geo. 75.

Executors may tender a deed, executed by their testator in his lifetime, and directed by him in his will to be delivered after his death. *Rearich v. Swinehart*, 1 Jones, 233.

(b) See *Jackson v. Bull*, 1 John. Cas. 81, that the same principle applies with reference to a mere contract to convey. But in a later case, in New York, it is held, that the giving effect to the deed from the first delivery is confined to special cases; and that ordinarily, a judgment against the grantor, recovered between the two deliveries, prevails over the title of the grantee. *Jackson v. Rowland*, 6 Wend. 666.

any event to deliver either of them; held, even if the conditions were fulfilled, there was no delivery.(1)

146. If the condition upon which a deed is deposited is fulfilled, and it is accordingly delivered, the grantee gains a valid title, though, by the mistake of some third person, the performance of the condition is not according to the intent. As where the condition was, that the grantee should have a certificate of the registry of a mortgage back, which was given him, but the mortgage proved to be wrongly recorded.(2)

147. Where a deed, and a bond and mortgage back, are handed by the parties to a stranger, to be kept by him during their pleasure, and subject to their order; they are not escrows—he is merely a *depository*.(3)

148. Where an instrument is delivered as an escrow, this fact should be expressly declared in the act of delivery, and noticed in the attestation. But the fact may be proved by parol evidence; and, in such case, the condition of delivery may be varied by a new parol agreement. Nor is the word *escrow* necessary. The question is one of *fact*, for the jury.(4)

149. The legal maxim is, "*In traditionibus chartarum, non quod dictum, sed quod factum est, inspicitur.*" Hence, to constitute an escrow, the delivery must be made *to a stranger*. If made to the grantee, though upon condition, the instrument is an immediate deed, discharged of the condition. But if a deed be delivered to the grantee, and afterwards to a stranger as an escrow, according to an agreement prior to its execution; the instrument shall operate as an escrow. In such case, the plain sense and justice of the case require that the deed, while in the hands of the grantee, should be considered as *in transitu* to the possession of the stranger.(5)(a)

150. So where a grantee received the deed, but agreed not to use it till the balance of the purchase-money should be paid; held, though the legal title passed, the grantor had a paramount lien for the price.(6) So where, previously to the execution of a composition deed, it was agreed, in presence of a surety for payment of the money, that the deed should be void unless signed by all the creditors, and the surety signed it, and it was delivered to one of the creditors, to procure the names of the others, who did not sign it; held, the deed was an escrow, and the surety not bound. But the execution, by a debtor, of a deed of trust, is not in the nature of an escrow before execution by the trustees.(7)

(1) Carr v. Hoxie, 5 Mas. 60.

(2) Beekman v. Frost, 18 John. 544.

(3) James v. Vanderheyden, 1 Paige, 385.

(4) Currie v. Donald, 2 Wash. 58; Murray v. Stair, 2 Barn & Cr. 82; Touch. 58; Wheelwright v. Wheelwright, 2 Mass. 452; Raymond v. Smith, 5 Conn. 555.

(5) Arnold v. Patrick, 6 Paige, 310; Co.

Lit. 36 a; Thoroughgood's case, 9 Rep. 137 a; Fairbanks v. Metcalf, 8 Mass. 238-9; Simonton's, &c., 4 Watts, 180; Johnson v. Branch, 11 Humph. 521; Lawton v. Sager, 11 Barb. 349.

(6) Arnold v. Patrick, 6 Paige, 310.

(7) Johnson v. Baker, 4 B. & A. 440; Simpson v. Sikes, 6 M. & S. 295.

(a) Whether a deed has been delivered or not, is a question of fact upon which parol evidence is admissible; but whether a deed, when delivered, shall take effect absolutely, or only upon the performance of some condition not expressed therein, cannot be determined by parol evidence, but only by the terms of the deed itself. Evidence that, at a time previous to the affixing of the seal of a corporation to an indenture between the corporation of the one part and two individuals of the other part, there was an understanding between the president and one of these individuals, that the indenture should not take effect until signed by the other, is inadmissible, to show that the instrument was not the deed of the corporation. Lawton v. Sager, 11 Barb. 349. Philadelphia, &c. v. Howard, 13 How. U. S. 307.

151. A, an intemperate young man, conveyed to his relatives, with the agreement that he might devise the property. No power of revocation was reserved, nor any undue influence used. A afterwards devised the land. Held, the deed was irrevocable, and the devise void.(1)

152. The condition, upon which an escrow is to take effect as a deed, may be non-performance by the grantor, as well as performance by the grantee. Thus, the agreement may be, that the deed shall be restored to the grantor, if he secure a debt to the grantee within a certain time; otherwise, delivered to the grantee.(2)(a)

153. Deeds are usually *attested*. It is said, that in the time of Elizabeth witnesses were not requisite. So in the time of Charles II. And the English rule is stated to be, that attestation is not a *thing essential to the deed itself*, but only constitutes *the evidence of its authenticity*.(3)

154. In New Hampshire, a statute of 1791 provided that deeds or conveyances, signed by two or more witnesses, &c., should be sufficient to pass lands, without other ceremony. It has been held that a deed, not thus signed, is invalid to pass real estate under this statute; but a deed, signed by only one witness, may in some cases operate as a covenant to stand seized, or bargain and sale. By the Revised Statutes, two or more witnesses are required to deeds. A deed attested by only one witness has been held invalid even against the grantor and his heirs.(4)

155. In 1660, a law was passed in Connecticut, requiring two witnesses to a deed, and has ever since remained in force. In Vermont, two witnesses are necessary to conveyances in fee, for life, or for more than one year. In Georgia,(b) to all instruments relating to real estate. In Alabama, Mississippi, Delaware, Massachusetts and Maine,(c) (except in barring entailments, which requires two,) witnesses are not required by statute; but it is usual to have two. In Rhode Island, (in conveyances in fee or for life,) *usage requires them*. In South Carolina, a statute provides that a deed of *release* shall be effectual, if attested by two witnesses. This act has been regarded as rather *directory* than *imperative*, and as not affecting the form of *other modes of conveyance*. But it has been held, that a deed without any, or with only one witness, was an invalid conveyance.(5)

156. In Ohio,(d) two witnesses are necessary to the signing of a deed, or the acknowledgment of such signing. But a deed not attested

(1) Hopkins v. Mazyck, 1 Hill, 242.

(2) Raymond v. Smith, 5 Conn. 555.

(3) 2 Rep. 5 a; Garret v. Lister, 1 Lev. 15; Wickes v. Caulk, 5 Har. & J. 36. See Doe v. Caperton, 9 Carr. & P. 112; Dole v. Thurlow, 12 Met. 157.

(4) French v. French, 3 N. H. 234; Pritchard v. Brown, 4 N. H. 397; N. H. Rev. St.

244; Underwood v. Campbell, 14 N. H. 393; Stone v. Ashley, 13 N. H. 38.

(5) Merwin v. Camp, 3 Conn. 41; 3 Griff. 7, 63, 483; 4 Griff. 570, 659, 832, 983, 1034; 3 Ib. 96; Craig v. Pierson, 1 Cheves, 271-2; 4 Kent, 457, n.; Wiswall v. Ross, 4 Port. 321; Verm. Rev. St. 311-12; Dole v. Thurlow, 12 Met. 157.

(a) Analogous to the case of a deed delivered as an escrow, is that of a deed, to the validity of which the approbation of some third person is necessary. In such case, the deed takes effect from the approval, though executed before. Jackson v. Hill, 5 Wend. 532.

(b) If the subscribing witnesses to a deed reside out of the state, secondary evidence may be resorted to, to prove its execution. Harris v. Cannon, 6 Geo. 382.

(c) No deed without a witness can be *proved*, according to law, on failure to acknowledge. Me. Rev. St. 373.

(d) A deed with one witness vests a perfect equitable title in the grantee, and makes the grantor a trustee for him. McLouth v. Rathbone, 19 Ohio, 21.

may be good as a *license*, or as a contract to be enforced in equity. In Illinois,^(a) *more than one* witness is necessary to conveyances in fee. In Indiana, two witnesses are necessary to deeds, unless acknowledged. In Michigan, a late statute provides, that no deed can be proved or recorded without two witnesses; and a subsequent one, that where a grantor *lives in the State*, there must be two witnesses to the deed. In Arkansas, two disinterested witnesses, either to the execution or acknowledgment. If not to the execution, the date of their subscription must be stated. In New York, one, as against a purchaser, &c.⁽¹⁾

157. In Tennessee, two witnesses are necessary to authorize registration, and as against subsequent purchasers. It has been held that evidence is admissible, of the bad character of subscribing witnesses.⁽²⁾

158. If a witness, though not seeing the party sign, is near at hand, and the latter brings the deed to him, acknowledges execution, and desires him to attest, the attestation is sufficient. So where the witnesses do not recollect the execution and delivery, but are sure they should not have attested if it had not taken place; this is sufficient. Where witnesses attest the *delivery*, the attestation is sufficient proof, in case of their absence. Otherwise, if they attest only the *execution*.⁽³⁾

159. If a deed be attested, through mistake or fraud, by an incompetent witness, Chancery will supply the defect. It has been held, that attestation by an interested witness is sufficient. But the wife of a grantee is not a good attesting witness.^{(4)(b)}

(1) Walk. 354; *Sullivant v. Franklin*, &c., 3 Ohio, 89; 3 Griff. 414, 455; 1 N. Y. Rev. St. 738; Mich. St. 1839, 219; 1840, 166; Ark. Rev. St. 189.

(2) *Batte v. Stone*, 4 Yerg. 168; *Gardenhire v. Parks*, 2 Yerg. 23; 4 Griff. 753.

(3) *Park v. Mears*, 2 Bos. & P. 217; Pe-

quawkett, &c. *v. Mathes*, 7 N. H. 230; *Ball v. Taylor*, 1 Car & P. 417; *Currie v. Donald*, 2 Wash. 58; *Dawson v. Dawson*, Rice, 243.

(4) *Smith v. Chapman*, 4 Conn. 344; *Johnson v. Turner*, 7 Ohio, 216; *Perry v. Watts*, 3 Man. & G. 775.

(a) An officer, before whom proof of a deed was made, certified thus: "This day personally appeared," &c.. "A B, a subscribing witness to the within deed, (who was to me made known by the oath of C D, a credible witness,) and who being by me, the same justice, duly sworn," &c. Held, it sufficiently appeared that A B was a subscribing witness, under the Illinois statute. *Reece v. Allen*, 5 Gilman, 236.

Heirs at law, on the 10th day of September, 1828, executed an instrument, by which they acquitted to one of the heirs all their interest in the estate. The instrument was not under seal, nor was any consideration expressed in it, nor was it attested by witnesses. Held, it could not operate as a deed under the statute of 1791, because it was not sealed nor witnessed. *Underwood v. Campbell*, 14 N. H. 393.

It was not a deed of bargain and sale, because not under seal; nor a covenant to stand seized, because there was no consideration of love and affection. Ib.

(b) The attestation of a deed, that it was "sealed and delivered" in presence of the subscribing witness, is sufficient. *Fosdick v. Risk*, 15 Ohio, 84.

The attesting witness to a sealed instrument proved, that the person whose name appeared to be signed thereto took her seat at the table; that he did not see her write her name; that he did not know whether, at the time of signing his name as witness, she had signed her name; that he could not say it was her handwriting, and that the instrument was not, to his knowledge, ever read to or by her. Held, this was not *prima facie* evidence of the signing, sealing and delivery of the instrument, on a plea of *non est factum*. *Edelen v. Gough*, 5 Gill, 103.

Where a deed executed by commissioners of loans, which was required by statute to be subscribed in the presence of two witnesses, was witnessed by but one, but duly acknowledged by the grantors at the time; held, it was a good execution. *Commissioners, &c. v. Chase*, 6 Barb. 37.

Where names of persons are found on a deed, in the usual place for subscribing witnesses, and they are not parties to the deed, they will be presumed to be witnesses to the instrument, though they are not stated to be such; and, therefore, where such a deed is to be proved, they must be produced, or their absence legally accounted for. *Chaplain v. Briscoe*, 11 S. & M. 372.

CHAPTER LXXXI.

FORMS AND KINDS OF DEEDS. COMMON LAW CONVEYANCES.

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|------------------------------------|-------------------|
| 1. Feoffment and livery of seizin. | 69. Confirmation. |
| 21. Gift and grant. | 76. Surrender. |
| 30. Exchange. | 88. Assignment. |
| 38. Partition. | 92. Defeasance. |
| 41. Release and quit-claim deed. | |

• 1. A *feoffment* originally meant *the gift of a feud*; and, since the abolition of feudal tenures in England, signifies a conveyance of an estate in fee-simple. It is a term not often used in the United States, the same kind of transfer being expressed by the words *grant* and *conveyance*. Most of the ceremonies, and many of the principles, connected with a feoffment, have been abolished in this country. Such of the latter as are retained, will be mentioned in connection with a deed of bargain and sale, which is the form generally adopted in the United States. Livery of seizin, the distinguishing ceremony of feoffment, is with us almost unknown; it being the general principle in this country, that a deed regularly executed, acknowledged, and recorded, will pass a title, though the possession remain unchanged.(1)

2. In Massachusetts, a colonial ordinance of 1651 declared that no alienation of land should be good, unless by deed, executed with livery and seizin, unless the deed be acknowledged and recorded.(2) (See sec. 6.)

3. In the same State, it is held, that *the execution* of the deed passes the estate without *registry*, except as to creditors and purchasers without notice; so that the estate cannot be divested from the grantee, to the prejudice of an attaching creditor of such grantee, by a restoration of the deed to the grantor, and a new conveyance by the latter to a third person having notice of the former. So the legality of a deed depends upon the circumstances existing at *the execution* of the deed. And a deed may be read in evidence, if recorded *before trial*. So a title passes to the grantee, though the grantor continues to occupy with him.(3)

4. In Kentucky, livery of seizin is unheard of. In Illinois, Mississippi, Virginia, and New York, and probably other States, it is expressly dispensed with. The act of Illinois provides, that all conveyances, recoveries, judgments and executions, by or against a party, not under disability, shall absolutely and fully vest the estate, as against the former owner and his heirs, and those claiming only to his use at

(1) 1 Bay, 107; Miller v. Halsey, 2 Green, 48; French v. French, 3 N. H. 260; Higbee v. Rice, 5 Mass. 352; Goodwin v. Hubbard, 15, 214; Concord v. McIntire, 6 N. H. 529; Mich. Rev. St. 257-8; Ark. Rev. St. 188; N. H. Rev. St. 243.

(2) Pidge v. Tyler, 4 Mas. 544-5; Durant v. Ritchie, 4 Mas. 56.

(3) Marshall v. Fisk, 6 Mass. 31; Flint v. Sheldon, 13, 445; 15, 214; 3, 573; Hatch v. Smith, 5, 51; Tomson v. Ward, 1 N. H. 11; Lawry v. Williams, 1 Shepl. 281; Harrington v. Gage, 6 Verm. 532; Den v. Richman, 1 Green, 44; Duval v. Bibb, 3 Call, 362; Lessee, &c. v. Hemphill, 3 Ohio, 237; Reading v. Weston, 7 Conn. 143.

the time. In Mississippi, the act applies as well to past as future conveyances.(1)

5. In Missouri, a deed of feoffment seems to be recognized, but livery is not necessary to it.(2)

6. In South Carolina, it was first decided, and afterwards expressly enacted, that a bargain and sale shall be an effectual conveyance without livery. But feoffment, with livery of seizin, is still a valid mode of transfer, and, if made by a tenant for life, will bar contingent remainders. In North Carolina, the same provision is made, as to a bargain and sale, lease and release, and a covenant to stand seized to uses. In Maryland, livery is unnecessary, since the period of April 13, 1674. A Massachusetts provincial act (9 Wm. 3, c. 8,) provided that a deed should pass a title to the land, *without any other act or ceremony*; referring to livery of seizin.(3) (See sec. 2.)

7. No precise words are necessary to a feoffment. Even a conveyance by the words *bargain and sell*, or *give and grant*, if accompanied by livery of seizin, has been held a feoffment. In the old charters of feoffment, the word *enfeoff* is not found; but *dedi et concessi*.

8. Upon this ground, where a husband and wife *grant, bargain, sell and convey* her land to a stranger, to the use of the grantors for life, remain ier to the use of the survivor in fee; although the deed may be deemed *anomalous* and a *nondescript*, yet, for the purpose of creating uses which the statute of uses will execute, which would not be the case with a bargain and sale, the instrument will be construed as a feoffment, or *quasi* feoffment.(4) So, where there was a conveyance, in consideration of a support being furnished to A, for life, by the grantee; if he shall fail to furnish such support, the instrument to be of no effect; and, under the conditions aforesaid, the grantee to have immediate possession: held, although there probably was not sufficient consideration to sustain this conveyance as a bargain and sale, or covenant to stand seized, it should operate as a feoffment; and that the condition was a subsequent one, and therefore the deed not void as taking effect *in futuro*.(5)

9. In Maryland, it was formerly held, that a deed cannot operate as a feoffment, without livery of seizin. But a subsequent case settles, that enrolment is a sufficient substitute for livery.(6)

10. In England, lands lying in the same county, or part of one manor, may pass by livery of a part in name of the whole; but, if they lie in different counties, and belong to different manors, there must be distinct liveries.(7)

11. Livery of seizin is either *in deed* or *in law*. The former is where the parties go upon the land, and the feoffor, by some symbolical act, as the delivery of a twig, turf, or latch of a door, or even by express words, without any act, gives possession to the feoffee. Mere delivery of a deed on the land is not sufficient; unless it be made in the name

(1) *Davis v. Mason*, 1 Pet 508; Illin. Rev. L. 129; Missi. Rev. C. 459; 1 Va. R. C. 158; 1 N. Y. Rev. St. 738.

(2) *Perry v. Price*, 1 Misso. 553.

(3) *Rugge v. Ellis*, 1 Bay, 107; 1 N. C. Rev. St. 259; *Dehon v. Redfern*, Dudl. Equ. 115; Md. L. 35. By the same act, in Maryland, transfers made prior to April 13, 1674,

in writing, are declared valid, notwithstanding any formal errors. Md. L. 35.

(4) *Durant v. Ritchie*, 4 Mas. 70; *Cheney v. Watkins*, 1 Har. & J. 527.

(5) *Green v. Thomas*, 2 Fairf. 318.

(6) *Carroll v. Norwood*, 5 Har. & J. 158; *Matthews v. Ward*, 10 Gill & J. 443.

(7) Lit. secs. 61, 418.

of seizin of all the lands contained therein. If a lessee is in possession, his consent is necessary to livery.(1)

12. *Livery in law*, is where the parties are not upon, but only in sight of the land; and the feoffor, pointing it out, gives it to the feoffee, and authorizes him to take possession. This, however, is a mere license or authority, which must be consummated by actual entry; and, if either of the parties die before entry, the transfer does not take effect. But, if the feoffee dare not enter for fear of his life, a claim as near the land as possible will be sufficient.(2)(a)

13. Livery of seizin may be made by attorney. But such attorney must be constituted by deed. And the power ceases with the life of either party.(3)

14. Livery may be presumed after a long possession, conformable to the deed, though not indorsed thereon. And equity will sometimes supply a defect in the form of livery, where the conveyance is made for a valuable consideration; as, for instance, by compelling the son of the feoffor to make a new livery.(4)

15. A feoffment, as has been already been stated, (Vol. I, ch. 2,) cannot be made to take effect *in futuro*.(b) This would put the fee in *abeyance* and defeat the *notoriety of transfer*, which is the great object of a feoffment. It has already been seen, (Vol. I, ch. 41, & sequ,) that this remark does not apply to a *remainder*. In such case, livery is made to the preceding tenant, even though a tenant for years merely, and enures to the benefit of the remainder-man. So, a feoffment made to A, B and C, *habendum* to A and B for their lives, remainder to C for his life, and livery made to all *secundum formam chartæ*.(5)

16. In some instances, a feoffment may be validly made, by a party who is in general legally incapable of conveying or contracting. Thus, an idiot or lunatic cannot avoid his own livery. The reason is, that a feoffment was originally made publicly, in presence of the "*pares curiæ*," whom the law therefore treated as competent and final judges of the party's capacity. The livery of an infant is voidable only, not void, and must be avoided by some act of equal notoriety in regaining possession. One merely a *privy in estate*, as a lord claiming by escheat, cannot avoid the feoffment of an incapable person. But, if such person make a feoffment through another, by power of attorney, the latter being void, the whole transaction is void also.(6)

17. A corporation may make a feoffment, and appoint an attorney to give livery.(7)

(1) Co. Lit. 48 a; Sharp's case, 6 Rep. 26; Thoroughgood's case, 9 Rep. 136; Vaughan v. Holdes, Cro. Jac. 80; Bettisworth's case, 2 Rep. 31.

(2) Co. Lit. 48 b; Parsons v. Perns, 1 Mod. 91.

(3) Lit. 66; Co. Lit. 52 a.

(4) Throckmerton v. Tracey, Plow. 149; Jackson v. Jackson, Fitz. 146; Thompson v. Attfield, 1 Vern. 40; Cheney v. Watkins, 1

Har. & J. 527; Rogers v. Eagle, &c., 9 Wend. 623. (See Carroll v. Norwood, 5 Harr. & J. 164.)

(5) Co. Lit. 217 a; Lit. 60; Norris v. Trist, 2 Mod. 78; Freeman v. West, 2 Wils. 166.

(6) Lit. 406; Perk. 12; 4 Rep. 124 a; Whittingham's case, 8, 42; Jackson v. Burchin, 14 John. 126.

(7) 4 Cruise, 47.

(a) By St. 3 & 4 Wm. IV, ch. 27, a mere entry upon, or continual claim near, the land, does not preserve the right of a claimant, without actual change of possession.

(b) In Mississippi, a freehold may be limited *in futuro*, by deed or will. Missi. R. C. 469. So, in some other States. (See Vol. I, ch. 2.)

18. One joint tenant cannot enfeoff another. Being seized *per mie et per tout*, both are regarded as in possession of the whole, and therefore livery is impossible. But it is otherwise with parceners and tenants in common.(1)

19. Corporeal hereditaments alone are the subject of a feoffment, for the obvious reason that incorporeal property cannot be actually delivered.(2)

20. A feoffment passes the whole title of the feoffor, and, if he have distinct interests in the land, it extinguishes them all. It has also the peculiar efficacy of transferring to another a greater estate than the feoffor owns himself. Thus, a lessee for years, in possession, may pass a fee simple by his feoffment. But it will operate as a disseizin of the lessor. The prevailing doctrine upon this subject in the United States, according to which a grantor can pass only the interest in land which he himself owns, has already been adverted to.(a) (Vol. I, ch. 4.) The remark, made by the court in New Jersey, is probably applicable alike in all the States: that where a statute gives to a deed of bargain and sale (the usual form of conveyance provided for in this country,) the efficacy of a feoffment at common law, such statute has no reference to the estate or quantity of interest which may be conveyed, but only intends to provide, that the bargainee shall be in full possession of the estate which is conveyed. The quantity of estate is to be known, not from the statute or its operation, but from the instrument by which the use is conveyed.(3)

21. A gift is the conveyance of an estate tail.(4)

22. A *grant*, at common law, is the conveyance of incorporeal hereditaments, such as rents, commons, &c., which are therefore said to *lie in grant*, and at common law could pass only by deed. The subjects of a grant, from their very nature, are of course not susceptible of livery. Hence the *attornment* of a tenant was always held sufficient to complete the transfer, and this is now dispensed with by statute. (See I, 209.) Chancellor Kent remarks, that feoffment and grant were the two great disposing powers of transfer of land, in the primitive ages of the English law. The same word, *grant*, is also applied, both in England and in this country, to letters patent from the government. It has been seen (ch. 79,) that, as applied to public lands in the United States, the word is synonymous with *patent*. In Massachusetts, the term *grant*, in a statute, means the transfer of *lands or houses*, by deed, or other effectual conveyance; and does not apply exclusively to incor-

(1) Co. Lit. 244.

(2) Co. Lit. 9 a.

(3) Co. Lit. 9 a; Lit. 611. See 4 Kent, 481, 488; Taylor v. Horde, 1 Burr. 60; Co. Lit. 48 b, 49 a; Bullock v. Diple, Poph. 38; Perk. 222; 2 Prest. on Abst. 390-2; Jerritt

v. Weare, 3 Price, 575; Blunden v. Baugh, Cro. Car. 302; Goodright v. Forrester, 1 Taun. 578; Doe v. Lynes, 3 Barn. & Cr. 388; Den v. Crawford, 3 Halst. 107-8; Pendleton v. Vandevier, 1 Wash. 381.

(4) Lit. 59.

(a) It seems worthy of notice, that similar departures from the common law have taken place in this country, with respect to both real and personal property. A feoffment, made in the presence of the *pares curiae*, passed an absolute title; and a sale made in *market overt* had the same effect. But, the *pares curiae* and the *market overt* being alike unknown in the United States, "*cessante ratione, cessat etiam lex*;" and the maxim of our law is, both as to lands and chattels, "*nemo potest in alium transferre plus quam ipse habet*."

poreal hereditaments. (See sec. 29.) So in New Hampshire and Maine.(1)

23. The formal words of a grant are, *dedi et concessi, given and granted*; but any others, which clearly express the intention, may have the same effect.

24. A, by article, granted and agreed with B, that, for a certain rent, he should have a way for himself and his heirs, over A's lands. Held, a good grant of a way, not a mere covenant.(2)

25. In order to pass by grant, the thing granted must be owned *at the time*; it is not sufficient that it be afterwards acquired. Thus, if one grant a rent from land which he does not own, but subsequently purchases, nothing passes. (See ch. 87, *Estoppel*).(3)

26. A bare right or possibility cannot be granted.

27. Remainders and reversions, consisting in right only, without possession, are proper subjects of grant.(4)

28. A grant passes only such estate or interest as the grantor may lawfully convey. In this respect it differs from a feoffment, as has been already seen. (Sec. 20.) The reasons of this distinction are said to be, that a grant was always made by deed, so that the grantor's title might be known by inspection; and that, unlike a feoffment, it was a secret transaction. Upon this principle, a grant can never create a discontinuance or forfeiture of the estate.(5)

29. The word *grant* is very generally used (in connection with others,) in American statutes relating to the transfer of real estate. In New York, by the Revised Statutes, conveyances are termed *grants*; and, though deeds of bargain and sale, and of lease and release, may continue to be used, they are to be deemed grants. Chancellor Kent is of opinion, that the word *grant* is sufficient, though not essential, to pass lands. (See sec. 22.)(6)

30. An *exchange* is a mutual grant of equal interests, the one in consideration of the other. According to the description of an exchange given by Littleton, it takes place only where the parties own the same quantity of land, in one county. Lork Coke mentions five requisites of this mode of conveyance. 1. The estates must be equal. 2. The word *escambium* or *exchange* must be used. 3. There must be an execution by entry or claim in the life of the parties. 4. If made by deed, it must be of things lying in grant. 5. If the lands lie in several counties, it must be by indenture. So, also, if the things lie in grant, though in one county. Before the statute of frauds, an exchange might be without writing; but not since.(7)

31. The *equality*, required by law for an exchange, applies only to the *quantity* of interest; and not to the value, quality or manner of the estate. Thus a fee requires a fee. But an estate in joint tenancy

(1) Co. Lit. 9 a, 172 a; French v. French, 3 N. H. 260; 1 N. Y. Rev. St. 739; 4 Kent, 489, 491; Dudley v. Sumner, 5 Mass. 472; Hastings v. Blue Hill, &c., 9 Pick. 80; N. H. Rev. St. 408; Me. Ib. 45.

(2) Holme v. Seller, 3 Lev. 305.

(3) Perk. 65. (See Illin. Rev. L. 131; Misso. St. 119.)

(4) Lit. 9, 567.

(5) Co. Lit. 251 b; 4 Cruise, 49, 50; Gilb. Ten. 122; Co. Lit. 322 a, 327 b, 251 b.

(6) 1 N. Y. Rev. St. 738; Co. Lit. 301 b; 4 Kent, 491. In Tennessee, a statutory deed operates as a grant, and passes only the grantor's lawful title; and the title passes, not by force of the statute of uses, but of the registered deed. Miller v. Miller, 1 Meigs, 484.

(7) Lit. 62; Co. Lit. 51 b; Harland v. Eastland, Hardin, 593; Cass v. Thompson, 1 N. H. 65; Maydwell v. Carroll, 3 Har. & J. 361; Provost, &c. v. Bishop, &c., 3 Wils. 489.

may be exchanged for one in common. So land, for an incorporeal interest in land, or a reversion. And a fee-simple may be exchanged for a base fee or a fee tail; and a life estate for an estate *pour autre vie*, both being freeholds. But not a life estate for a fee.(1)

32. An exchange must be executed by entry, at least in part, during the lifetime of the parties. If both die before the entry of either, the exchange is void; an heir cannot enter. But if one enter and the other die before entry, his heir may enter. If the exchange is made by lease and release, operating by way of use, entry is unnecessary.(2)

33. The exchange of an infant is only voidable, not void. Hence, if he enter upon the land given him in exchange, and occupy after coming of age, he is bound by the confirmation. The entry is held equivalent to livery; and there is a fair recompense.(3)

34. In England, the exchange of a married woman is voidable, though her husband join in the deed, and though she afterwards enter into a fine of the lands received by her. But her occupation of the land after the husband's death operates as a confirmation.(4)

35. It seems, the form of conveyance, known technically as an exchange, cannot take place between more than two persons. The characteristic feature of the transaction is, a strict mutuality or reciprocity between the parties, by which the implied warranty of each,(a) and the right of re-entry upon the land conveyed in case of breach of warranty, is an exact offset or counterpart to that of the other; and this mutual obligation and right are inconsistent with the existence of more than two parties. But, where there are two or more persons having substantially the same interest, the law regards them as constituting but one person, and they make one party to an exchange. Thus, two joint tenants on one side may make a valid exchange with two tenants in common on the other.(5)

36. In the United States, it has been said, conveyances by way of exchange do not differ in principle from common deeds of bargain and sale.(6)

37. In Kentucky, it is held, that the word *exchange* is necessary. In New Hampshire, the subject of exchange was considered, in a case, the facts of which were briefly these. A and B agreed by parol to exchange their farms. Each conveyed his farm to the other, nominally for a pecuniary consideration. Held, this was not technically an exchange, and the wife of A was entitled to dower in both farms.(7)

38. *Partition* among joint tenants, &c., though anciently made by mere agreement for distinct occupancy, can now be made only by the methods of legal process already referred to, (see *Partition*,) or by mutual deeds, in which each party takes from all the rest a conveyance of the distinct portion allotted to his share. At common law, co-parceners, being compellable to make partition, might do it by parol; but the

(1) Co. Lit. 50 b; Lit. 64-5; 4 Rep. 122 b; Bustard v. Coulter, Cro. Eliz. 902; 1 Rolle's Abr. 813; 2 E. 2, 23.

(2) Lit. 62; Shelley's case, 1 Rep. 98 b.

(3) Co. Lit. 50 b, 51 b.

(4) 1 Leon. 285.

(5) Co. Lit. 50 b, n. 1; Prov. of Eton v. Winchester, 3 Wils. 389; Co. Lit. 51 a, n. 1.

(6) See 4 Dane, 149; Oliv. Convey. 248.

(7) Harland v. Eastland, Hardin, 593; Cass v. Thompson, 1 N. H. 65.

statute of frauds requires a deed in all cases. Between co-parceners, partition involves an implied warranty. (See ch. 85.)

39. Husbands cannot bind their wives by partition of lands belonging to the latter.(1)

40. In equity, a mere agreement may operate as an actual partition.(2)

41. A *release* is the conveyance of a right to a person in possession; as for instance by a disseizee to a disseizor. The technical words used are, "remise, release, and forever quit-claim." But where a lessor for life granted to the lessee, that he should be discharged from the rent, this was held a sufficient release. So a covenant is sometimes construed as a release. But, to have this effect, it must be between the same parties only, and give the covenantee a right of action, which will precisely countervail that to which he is liable. And the parties must so intend.(3)

42. In England, there are four kinds of release pertaining to land.

43. The first is a release by way of *mitten l'estate*. This is where several parties hold land by a joint title, and one transfers his interest to the rest. Thus, joint tenants and co-parceners may release to each other. The former having come to the estate by one and the same feudal contract, which was matter of notoriety by means of livery, no further notoriety is deemed necessary, in a mere subsequent arrangement between themselves, as to their mutual and relative ownership; while co-parceners, coming to the land by descent, without notoriety, may, therefore, privately release to each other. It has been seen, (p. 313,) that one joint tenant cannot enfeoff another. But, as co-parceners transmit distinct estates to their children, one may enfeoff as well as release to his companion.(4)

44. In a release of this kind, a fee will pass without words of limitation. The releasee is deemed in law to hold not by the release, but by the original limitation to all the parties. The release is not an alienation, but a mere discharge of the claims of one to the other. Hence, a fee arises out of the original conveyance.(5)

45. Tenants in common, having distinct freeholds, cannot release to each other.(6)

46. Another form of release, is that by way of *mitten le droit*. This is a release by a disseizee to his disseizor, or a party claiming under him, in possession of the land. Here, as in the former case, a fee will pass without words of limitation.(7)

47. Where two persons are in possession under an imperfect or tortious title, as by disseizin, a release to one enures to the benefit of both.(8)

48. A third kind of release, is that which operates by way of *enlargement of estate*. This is where a reversioner relinquishes all his right to a particular tenant in possession of the land.

49. To such release it is necessary that there be *privity of estate* between the parties—as between lessor and lessee. But a lessee must

(1) 4 Cruise, 70.

(2) Ib.

(3) 4 Cruise, 71; Co. Lit. 264 b; Garnett v. Macon, 2 Brock. 185.

(4) Lit. 304; Co. Lit. 273 b; Gilb. Ten.

(5) Ib.

(6) Lit. 304.

(7) Lit. 466, 7; Gilb. Ten. 55. See Winthrop v. Benson, 31 Maine, 38.

(8) Flagb v. Mann. 2 Sumn. 487.

have entered upon the land, having before entry only an *interesse termini*. (See Vol. I, *Estate for Years*.)

50. If there be a lease for life, remainder for life, and the former lessee die; a release may be made to the latter before entry.

51. A release to an under-lessee is void for want of privity.

52. A release to a tenant at will is good, there being a privity between him and the lessor. Otherwise, with tenant at sufferance.

53. A *cestui que use*, at common law, might take a release from his feoffee to use, being as a tenant at will to the latter. The same principle is now applicable to a trustee and *cestui que trust*.

54. One holding by *statute merchant*, *statute staple*, or *elegit*, may take a release.(1)

55. The husband of a woman, tenant for life, may take a release; having a freehold in her right, and being in privity with the lessor.

56. Actual possession, it seems, is not necessary to render one capable of taking a release from a reversioner; but only an estate susceptible of enlargement. Thus, a lessee may take a release, though he have previously underlet. So, a lessee for years in remainder.(2)

57. A release by way of enlargement will not pass a fee without words of limitation.(3)

58. A fourth form of release, is one which, from the peculiar connection and relation of the parties, cannot operate as such, and is therefore construed as an *extinguishment*. Thus, where one, having a rent or right of common, relinquishes it to the *terre tenant*, as the latter can have no such privilege *in his own land*, this is an extinguishment. So, a release to a lessee for years before entry, which cannot operate as such, *extinguishes* the rent.(4)

59. A tenant for life conveys for his own life to A, remainder to B in fee, and the reversioner releases generally to A. This release cannot pass the fee to A, by way of *mitter le droit*; but it operates as an *extinguishment*, and enures to the benefit of the remainder-man.(5)

60. All interests, rights and profits arising out of, or annexed to land, may be released. But no possibility, right, title, or thing in action, can be granted or assigned to a stranger. This rule is founded upon the principle of avoiding *maintenance* and the multiplication of suits.(a) So, a mere possibility cannot be released. Thus, the heir apparent of a disseizee cannot release to the disseizor, but, on inheriting the land, may still assert his title. It is said, a freehold right or title may be released in five ways. 1. To the tenant of the freehold in fact or in law, without any privity. 2. To the person in remainder. 3. To the person entitled to the reversion, without privity. 4. To one having a right only by privity. Thus, if a tenant is disseized, the lord may release his services, in respect of the privity and right, without any estate. 5. To one having privity only without right. Thus, if tenant in tail make a feoffment, the donor may release to the donee the rent and services, though the latter has no right—on account of privity.(6)

(1) Lit. 459, 60, 62, 65; Co. Lit. 270 a, and n. 3; 270 b; 271 a; 272 b; 273 a, b.

(2) 4 Cruise, 73, 4.

(3) Lit. 465.

(4) Lit. 479, 80; Co. Lit. 280 a, 270 a.

(5) Lit. 470.

(6) Lampet's case, 10 Rep. 46; Gilb. Ten. 53, Lit. 446; Co. Lit. 265 a. See *Edwards v. Varick*, 5 Den'co, 664.

(a) See *Maintenance*.

61. A bare authority cannot be released; nor a power collateral to the land.

62. A release may have the effect of a *confirmation*. Thus, A conveys to B land to which he has no title, by warrantee deed, and B enters. Afterwards, B being in possession, A takes a deed of release from the true owner. Held, this should operate as a confirmation of B's title.(1)

63. So the words "release and forever quit-claim," have been held, in New York, sufficient to raise a use and constitute a bargain and sale; a consideration being proved, though not expressed. So the words "release and assign." The same principle is adopted in North Carolina, and by statute in Michigan and Maine.(2)

64. In the United States, the technical principles relating to a release seem to be wholly or in great measure inapplicable. The conveyance corresponding with a release at common law, is with us a *quit-claim deed*, in which the effective words are "release, remise and quit-claim," and the grantor covenants only against those who claim under himself, and not against adverse and paramount titles. Of this class are all deeds given by public officers, such as administrators, sheriffs, &c., who covenant only for the regularity of their own proceedings, and can neither bind the execution debtor, or the estate of their testator or intestate, by any covenant respecting the property sold, or any other contract originating with themselves and unauthorized by law. All such covenants are personal merely, if it can be plainly inferred that they intended so to bind themselves.(3)(a)

65. It has been held, that a deed of release cannot operate *as such*, unless the grantee is in possession; but, to effect a conveyance, (as has been seen, sec. 63,) it will be construed as a bargain and sale or otherwise, though no word of grant be used. But a release, without proof of actual or constructive possession by the releasor, or of entry by the releasee, will not maintain an action of trespass by the latter. So, one who has never been in possession, and has no title, color or claim of title, can pass nothing by a quit-claim deed.(4)

(1) *Oakes v. Marcy*, 10 Pick. 195.

(2) *Jackson v. Fish*, 10 John. 456; *Bronson v. Paynter*, 4 Dev. & B. 393; Mich. Rev. St. 258; Me. Rev. St. 372.

(3) *Worthy v. Johnson*, 8 John. 236.

(4) See *Snyder v. Laframboise*, 1 Bre. 270; *Fray v. Pierce*, 7 Mass. 381; *Russell v. Coffin*, 8 Pick. 143; *Marr v. Boothby*, 1 Appl. 150; *McAllister v. McAllister*, 12 Ired. 184; *Dame v. Wingate*, 12 N. H. 291.

(a) See *Oliver v. Piatt*, 3 How. 333. Where the collector of a particular land tax gave a deed conformable to the statute, with warranty, and the title failed by reason of a defect in the prior proceedings; held, he was not liable. *Gibson v. Mussey*, 11 Verm. 212.

Upon a tax sale under the New Hampshire Statute of Dec. 10, 1796, the collector gave a deed, with covenants of a right to convey, and of general warranty, conformably to the act. Held, he was not personally liable for a failure of title arising from errors in the assessment. *Wilson v. Cochran*, 14 N. H. 397.

If a Master in Chancery sells property under a decree, as and for a good title; the conveyance is to be construed like that of a private grantor. *Spring v. Sandford*, 7 Paige, 550. But a sale under a decree does not regularly involve a warranty. *Wampler v. Shipley*, 3 Bland, 183. See N. H. Rev. St. 395; *Ennis v. Lead*, 1 Ired. Equ. 416; *Furnival v. Coombes*, 5 Mann. & G. 736. It is said, the grantee in a quit-claim deed takes the risk of the title, *unless there is fraud*. *Snyder v. Laframboise*, Bre. 270; *Doyle v. Knapp*, 3 Seam. 338. A covenant to warrant and defend, "as executors are bound by law to do," does not bind the covenanters personally. *Day v. Brown*, 2 Ohio, 345.

65 *a*. Release of the grantor's interest in certain land, stating that he conveyed only what he then owned, not what had been conveyed to any other person. Held, the deed was as effectual as a deed of bargain and sale; but that the purchaser could not claim land previously conveyed by an unrecorded deed.(1)

66. In Massachusetts, a grantee, having had no actual possession, excepting by leasing to his grantor and receiving rent, conveyed for valuable consideration, by *quit-claim and release*, which was recorded, to one having no previous possession or title. Held, a valid conveyance. The quit-claim deeds, in common use in Connecticut, operate as primary or original conveyances.(2) But, in Maryland, it has been held, that a deed could not operate as a release to enlarge the estate of the grantee, because he had no previous legal estate.(3)

67. In New Hampshire, the word *quit* has been held effectual to pass the title of a grantor.(4)

68. Although one who conveys by quit-claim deed is not responsible for defects of title, yet, where a seller of land brings a bill in equity against the purchaser for specific performance of the contract, he cannot prevail; if unable to make a good title to the land or any undivided portion of it, notwithstanding there was no agreement to warrant; unless the purchaser was expressly to take the risk of title. But after conveyance, if there were no fraud or misrepresentation, such defect of title is no ground for recovering back the price.(5)

69. A *confirmation* is a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or where a particular interest is increased. Thus, if tenant for life lease for years, and die during the term, the reversioner may give the lessee for years a deed of confirmation, and thereby render his estate good. A confirmation, operating to increase an estate, is precisely similar to a release by way of enlargement, which has been already explained. Hence, it requires privity of estate and words of limitation. Thus, in the case above supposed, a confirmation to the lessee for years, *living the tenant for life*, would be void for want of privity.(6)

70. The appropriate, technical words of a confirmation are *ratify, approve and confirm*. But *give and grant* may have the same effect; as, for instance, in a deed from a disseizee to the disseizor.(7)

71. If one disseized make a deed of confirmation to the disseizor, the whole estate of the former passes without words of inheritance, or even where the confirmation is expressly made for a day or an hour.

72. If the disseizor have leased for years, the disseizee may confirm the interest of the lessee in part; but this must be done by confirming *the land for a part of the time*, not by first confirming the lease or the estate of the lessee, and then adding *for a part of the time*, for this is repugnant to the prior confirmation. So the confirmation may be restricted to a *part of the land*. But a freehold estate, being one entire thing, cannot be confirmed in part.(8)

(1) *Butterfield v. Smith*, 11 Illin. 485.

(2) *Russell v. Coffin*, 8 Pick. 143; *Hastings v. Blue, &c.*, 9, 80, Mass. Rev. St. 405; *Smith v. Rendell*, 19 Conn. 107.

(3) *Carroll v. Norwood*, 5 Har. & J. 158.

(4) *Gordon v. Haywood*, 2 N. H. 402.

(5) *Bates v. Delavan*, 5 Paige, 299.

(6) Co. Lit. 295 b; *Gilb. Ten.* 75; *Lit.* 516-17; 1 Bre. 236; *Fauntleroy v. Duhn*, 3 B. Mour. 617; *Maher v. Hobbs*, 2 Y. & Coll. 317.

(7) *Lit.* 531; *Beaumont's case*, 9 Rep. 142 a.

(8) *Lit.* 519-20; Co. Lit. 297 a.

73. Where a lessor for life confirms to the lessee *his estate in the land*, to hold *his estate to him and his heirs*, the limitation to heirs is void, for they cannot take an estate which is merely for life. But if he confirm the estate, to have *the land* to him and his heirs, this passés the fee.(1)

74. A confirmation cannot strengthen a *void* estate, but only one that is *voidable*. Thus, where a former deed is void for uncertainty, not being duly located upon the land; a later one, confirming it and describing the land by metes and bounds, is no confirmation.(2)

75. But where a *feme covert* joins with the husband in a deed of her land, (in England,) redelivery by her, after his death, without re-execution or attestation, operates as a confirmation.(3)

76. A *surrender, sursum redditio*, is a conveyance directly opposite in its nature to a release; the latter being the descent of a greater estate upon a less, or of the reversion upon a particular estate, while the former is the falling of a less estate into a greater, or a particular estate into the reversion. Lord Coke defines a surrender, as a yielding up of an estate for life or years to him that hath an immediate estate in the reversion or remainder, wherein the estate for life or years may drown by mutual agreement between them.(4)

77. A surrender imports a benefit, and, therefore, by its own operation, vests the estate in the party to whom it is made, without his express consent.(5)

78. A surrender has the effect of changing the former relation of lessor and lessee, notwithstanding any special agreement for its continuance. Thus, where the lessee, upon making a surrender, agreed that the lessor might still recover the rent in any mode authorized by the lease; held, no distress would lie after such surrender, but the only remedy was on the contract.(6)

79. A surrender has the effect of merging or extinguishing the estate, only as between the immediate parties. It does not affect estates previously created by the surrender. Thus, though tenant for life surrender, a rent-charge granted by him still subsists. So, if he have leased for years, the lease continues; though the rent is extinguished.(7)

80. The technical words of a surrender, are *surrender and yield up*, but other expressions are sufficient; as, for instance, those usually appropriated to a release or quit-claim deed. So, if a lessee for life lease to the lessor for the life of the former, this is a surrender.(8)

81. At common law, lands might be surrendered without deed or livery. But things lying in grant could not; as a deed was necessary to create them. And even such things, lying in grant, as were not created by deed, were subject to the same rule; as, for instance, a remainder for life after a lease for life. So an estate by the curtesy, or in dower.(9)

82. By the English statute of frauds, adopted or copied in all the States, no surrender is valid unless made in writing, signed by the

(1) Lit. 524.

(2) Co. Lit. 295 b.; *Blessing v. House*, 3 Gill & J. 290. See *Love v. Shields*, 3 Yerg. 405.

(3) *Goodright v. Straphan*, Lofft, 763; *Goodright v. Straphan*, Cowp. 201.

(4) Co. Lit. 337 b.

(5) *Thompson v. Leach*, 2 Salk. 618; *Show. Parl. Cas.* 150.

(6) *Bain v. Clark*, 10 John. 424.

(7) *Touch.* 301.

(8) *Perk.* 607; *Smith v. Mapleback*, 1 T. R. 441.

(9) Co. Lit. 338 a.

party, or by operation of law. It has been held, that under this provision, the cancelling of a lease is no surrender, being merely symbolical, like livery of seizin at common law. But the taking of a new lease is a surrender by operation of law, being evidenced by writing, and therefore coming within the spirit and intent of the statute.(1)(a)

83. As appears from the definition of a surrender, given above, this conveyance requires that the party making it be in possession, and that the party receiving it have a greater estate immediately in remainder or reversion, in which the smaller estate may merge. Thus, a lessee, who has been ousted, or a widow, having a mere right to dower, cannot surrender. So, a lease, made to commence *in futuro*, cannot be surrendered, for the lessor has no reversion, and the lessee no possession.(2)

84. A surrender also requires *privity of estate* between the parties. Thus, an under-lessee cannot surrender to the lessor. But if A lease to B for 20 years, and B to C for 10, and B and C join in a surrender to A; this is good in law, for the surrender of B is construed to precede that of C, so that the latter takes effect.(3)

85. An estate at will cannot be surrendered; being determinable at the will of either party, and the formality of a surrender being therefore unnecessary.(4)

86. Though formerly doubted, it is now settled, that tenant for years may surrender to the reversioner for years; and the doctrine has been pursued into many nice and somewhat singular details. Thus, it is held to be immaterial, whether the reversioner has a longer or shorter term than the tenant. For instance, if A, lessee for 20 years, lease to B for 10 years, and then assign his reversion to C for one year, B may surrender to C, and B's whole interest will be thereby extinguished. So if A lease to B for 10 years, and then assign his reversion to C for one year, and C grant his interest to B, this is a surrender, in law, of B's entire term, amounting to a new lease. In both these cases, C gains nothing by the surrender from B, whether actual, or by operation of law; but the effect of it is, to change the reversion of A from an expectancy upon a lease for 10 years, to an expectancy upon a lease for one year. So if A, a lessee for 20 years, lease to B for 10 years, and then assign his reversion to C for 10 years, B may surrender to C, and thereby entitle him to possession for the remainder of the ten years.(5)

87. A being the tenant of B, and C of D, A and C agree to exchange their lands, and each to take the place of the other as lessee. They accordingly entered, each upon the other's premises, and communicated the arrangement to E, who was the common agent of B and D, and E assented to it. Held, this was evidence to a jury of a surrender of A's interest to B.(6)

(1) *Farmer v. Rogers*, 2 Wils. 27; *Magenis v. Macculloch*, Gilb. R. 236; *Roe v. Archbishop*, &c., 6 E. 86.

(2) 4 Cruise, 79; Perk. 599-600.

(3) *Paramour v. Yardley*, Plow. 541.

(4) *Sweeper v. Randal*, Cro. Eliz. 156; *The King v. Kemp*, 12 Mod. 79.

(5) *Hughes v. Robotham*, Cro. Eliz. 302; *Hughes v. Robotham*, Poph. 31; Bac. Abr. Lease, s. 2.

(6) *Bees v. Williams*, 2 Crompt. Mees. & R. 581; 1 Tyr. & G. 23.

(a) Leases are usually made by indenture, and are therefore signed by the lessee. Whether a lease by deed-poll, signed only by the lessor, would come within the same principle, is, perhaps, doubtful.

88. An *assignment* is a mode of conveyance applicable to any estate in lands whatever; but the term is usually employed to express the transfer of a leasehold interest. We have, therefore, been led to consider the subject to some extent in the former volume, under the title of *Estate for Years*. (Vol. I., ch. 14.)

89. Where a lessee agrees with a third person, that the latter shall have the land for the remainder of his term, paying to him, the lessee, the same rent which is reserved on the lease, this is an under-lease, not an assignment.(1)

90. The technical words appropriated to an assignment, are *assign*, *transfer*, and *set over*; but any others, which express the parties' intention to make and receive an entire transfer, are sufficient—as, for instance, *give*, *grant*, *bargain* and *sell*.(2)(a)

91. Every estate in lands and tenements, and every present and certain estate or interest in incorporeal hereditaments, may be assigned. So any interest which is vested *in presenti*, though to take effect *in futuro*, as, for instance, a future term for years. A mere right of entry, however, as will be more particularly seen hereafter,(b) is not assignable—as, for instance, the right of one disseized. With regard to the assignment of *contingent interests*, and of *powers*, the former has been already, and the latter will be considered, under the titles pertaining to those subjects.(3)(c)

92. A *defeasance* is defined as “a collateral deed, made at the same time with a feoffment or grant, containing certain conditions, upon performance of which the estate thereby created may be defeated.” It differs from a *condition* in nothing, but that the latter makes a part of the conveyance itself, while the former constitutes a separate instrument. It has been already stated, (Vol. I., ch. 27) that, by the common law, a condition of defeasance can be annexed to a conveyance of lands only at the time it is made, not afterwards. The nature and requisites of a defeasance, as converting an absolute deed into a mortgage, have also been considered under that extensive title.(4) (Vol. I., ch. 29.)

(1) *Poultney v. Holmes*, Stra. 405; *Palmer v. Edwards*, Doug. 187 n.
(2) 4 Cruise, 81.

(3) *Perk.* 91; *Co. Lit.* 46 b.
(4) 4 Cruise, 82; *Co. Lit.* 236 b, 237 a; *Touch.* 397.

(a) So the words “mortgage, assign, and transfer,” in a deed, will pass the legal estate. *Gambriel v. Doe*, 8 Blackf. 140.

(b) See *Maintenance*.

(c) See *Remainder*, *Powers*.

CHAPTER LXXXII.

FORMS AND KINDS OF DEEDS. DEEDS UNDER THE STATUTE OF USES.

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| <ol style="list-style-type: none"> 1. Uses and trusts, conveyances which create. 3. <i>Bargain and sale</i>, nature and history of; whether a <i>contract</i>, or a <i>conveyance</i>. 8. Words necessary to. 9. Who may convey by. 10. What may be conveyed. 12. Conveyance <i>in futuro</i>. 13. Consideration. 19. Enrolment. 20. Covenant to stand seized, &c., nature of, and words necessary to create; | <ol style="list-style-type: none"> other conveyances, when construed as such. 37. Who may convey by. 38. Consideration. 52. Operation and effect of 53. Rent created by. 54. When void. 55. Bargain and sale, &c., pass only the grantor's estate. 56. Use upon a use. 57. Lease and release. 65. Conveyances to uses, changing the possession. |
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1. THE general subject of Uses and Trusts has been considered in the former volume of this work. In connection with other modifications of the law of real property, the introduction of uses and trusts gave rise to corresponding new forms of conveyance, the consideration of which was more properly postponed to the present title, of Deed.

2. In England there are two classes of conveyances, which derive their operation from the statute of uses. The first class consists of those which create a use alone, without any transmutation of possession under the common law. The second class consists of those conveyances, which transfer the land as by a common law assurance, and in addition thereto raise or declare a use upon the legal estate vested in the grantee. To the former class belong a *bargain and sale*, and a *covenant to stand seized to uses*; to the latter, a *jeoffment* and a *fine* made to one person to the use of another.(1)

3. A *bargain and sale*, under the English law, is a contract, whereby a person conveys his lands to another, for a pecuniary consideration, in consequence of which a use arises to the bargainee. It is the mode of conveyance most prevalent in the United States, and gives a seizin to the bargainee, without entry or pernaney of the profits.(2)

4. A bargain and sale, as above stated, was originally a *contract* for the conveyance of land, for a valuable consideration. Before the statute of uses, a bargain and sale of land, for pecuniary consideration, raised a use in favor of the bargainee. No deed was necessary.(a) Since the statute, such use is executed, and becomes a legal estate. The *bargain* becomes a *sale*, and complete transfer of the title. Hence, where a deed has all the requisites and the form of an absolute conveyance, by way of bargain and sale *in præsentî*, a pecuniary consideration being paid or secured, although it also contains a *covenant to make a patent*,

(1) *Durant v. Ritchie*, 4 Mas. 65-6; *Marshall v. Fisk*, 6 Mass. 24; *Cox v. Edwards*, 14, 491; *Thatcher v. Omans*, 3 Pick. 532.

(2) 4 Cruise, 89; 2 Inst. 671; 4 Kent, 495; *Goodwin v. Hubbard*, 15 Mass. 214.

(a) Under the statute of uses, a conveyance of land, as, for instance, a bargain and sale, must be under seal. *Underwood v. Campbell*, 14 N. H. 393.

such covenant shall be construed to mean, that the grantor will *procure* a patent to be made to the grantee by the State.(1)

5. But, in New York, where a deed was made in this form, and the consideration not paid or secured, and the grantee covenanted, in consideration that the grantor should make him a good and sufficient deed by a certain day, to assign to him certain lands; upon the grounds, that the instrument was in form executory, and that the bargain and sale was not at that time in use to pass lands, being supposed to require enrolment; the deed was held not to pass the land.(2)

6. So where, by articles of agreement for the sale of lands, it was agreed that upon a future payment of money, the vendee should receive a deed, though the words "do grant, bargain and sell" were also used, and bonds given for the price; the estate did not pass.(3)

7. So, where an instrument, providing for the sale of lands, contained the words "do sell and deliver," and some kind of possession was given; but provision was also made for future, executory acts, as the making of a conveyance, payment of money, &c., and no words of inheritance were used; held, the estate did not pass.(4)(a)

8. The technical words appropriated to this species of conveyance are *bargain and sell*; but any others, which before the statute would have raised a use, are sufficient. As where one *aliens and grants* to another, for pecuniary consideration, by deed indented and enrolled; or where one covenants, for money, to stand seized to the use of his son, by deed enrolled. It is said, nothing can be more liberal than the rules of law, as to the words requisite to create a bargain and sale. There must be a valuable consideration, and then any words, that will raise a use, are sufficient.(5)

9. As a bargain and sale passes only a use, no one can convey by this method, who is incapable of being seized to uses.(6)

10. Any vested estate may pass by bargain and sale; including reversions, remainders, and other incorporeal hereditaments. But such hereditaments must be in actual existence at the time. Thus, a new right of way over land cannot be created by this form of conveyance. It is doubted, whether mere equitable estates can pass by bargain and sale.(7)

11. An estate less than freehold may pass by bargain and sale, provided the bargainor has a freehold. But if he has a mere term, it is

(1) *Thatcher v. Omans*, 3 Pick. 529; *French v. French*, 3 N. H. 260; *Durant v. Ritchie*, 4 Mas. 66; *Sharington v. Strotton*, Plow. 303; *Edward, &c.*, case, 8 Rep. 94 a; 4 Kent, 495; *West v. Biscoe*, 6 Har. & J. 465; *Lessee, &c. v. Bucher*, 3 Wash. Cir. 376.

(2) *Jackson v. Myers*, 3 John. 388.

(3) *Sherman v. Dill*, 4 Yeates, 295.

(4) *Campbell v. Sproat*, 1 Yeates, 328. (See *Jackson v. Hoesen*, 4 Cow. 325.)

(5) 2 Inst. 671; *Fox's case*, 8 Rep. 93, 94 a; *Grey v. Edwards*, 4 Leon. 110; Co. Lit. 49 a; 4 Kent, 495; *Jackson v. Fish*, 10 John. 456-7, 505; 3 N. H. 261.

(6) 4 Cruise, 90; *Jackson v. Burchin*, 14 John. 126.

(7) 4 Cruise, 90-1; *Taylor v. Vale*, Cro. Eliz. 166; *Beaudely v. Brook*, Cro. Jac. 189; *Hollingsworth v. M'Donald*, 2 Har. & J. 230.

(a) By a sealed instrument, in consideration of \$600, A "grants, bargains, sells, assigns and sets over" to B, all the estate inherited from his father, "to hold, &c., forever." "B now pays \$55 on account and in part of the consideration, and engages to pay the rest upon execution of a more formal assignment," which A agrees to make at a certain time and place. The instrument was acknowledged by B, and recorded. Held, not a conveyance. *Dawson v. M'Gill*, 4 Whar. 230.

otherwise, because his estate is not such as enables him to be seized to a use.(1)

12. In New York, the question has arisen in several cases, whether a bargain and sale, to take effect *in futuro*, is valid.(a) In some of them, it seems to have been taken for granted, or expressly decided, that it is not, unless the circumstances authorize its being construed as a covenant to stand seized. But a late case has established the contrary doctrine. It is said, that this form of conveyance operates under the statute of uses alone, and that future limitations of uses have always been allowed; the future use, in the case supposed, arising out of, and being supported by, the seizin of the bargainor. Originally, (as has been seen,) a bargain and sale was a mere contract or *covenant*. The title of *covenant to stand seized* was exclusively applied to cases of a *good* consideration, only because the want of any pecuniary price precluded the notion of a *sale*. But, substantially, both these forms of conveyance stood on the same ground. The first distinction between them was made by the statute of enrolments. Chancellor Walworth cites the opinions of many late elementary writers, to show that a bargain and sale may take effect *in futuro*.(2)(b)

13. A bargain and sale, as appears from the definition already given, requires a consideration, without which a use cannot arise; and, as the name imports, this consideration must be pecuniary. But, as between the parties, it is sufficient that a consideration is expressed; no averment lies to the contrary. It is not necessary that the precise amount of the consideration should be mentioned in the deed. And where the conveyance is made to several persons, the estate passes to them all, though one only is stated to have paid the consideration. So the consideration may be proved by parol evidence, though not expressed in the deed. So the consideration of advancement to the daughter of the bargainor may be shown, in addition to a pecuniary consideration, expressed.(3)(c)

(1) 4 Cruise, 91.

(2) Jackson v. Dunsbath, 1 John. Cas. 94; Jackson v. Swart, 20 John. 87; Rogers v. Eagle, &c., 9 Wend. 611; Barnes on R. P. 246; Burton, 45, pl. 145; Cornish, Purch. Deeds. 35; 4 Kent, 298. (See Roe v. Tranmer, 2 Wils. 75; 2 Keny. 239; Green v. Thomas, 2 Fairf. 318.)

(3) Moore v. West, 4 Binn. 1; 3 Prest. Abs. 13. 23; Shep. Touch. 222; U. S. Bank

v. Housman, 6 Paige, 536; Mildmay's case, 1 Rep. 176 a; Fisher v. Smith, Moo. 569; Jackson v. Sebring, 16 John. 515; Jackson v. Delancey, 4 Cow. 427; Porter's case, 1 Rep. 24 a; Sutton, &c., 10 Ib. 34 a; 2 Inst. 672; White v. Weeks, 1 Penns. 485; Hayden v. Mentzer, 10 S. & R. 329; Goodell v. Pierce, 2 Hill. 659; Okeson v. Patterson, 1 W. & Serg. 395; Corwin v. Corwin, 9 Barb. 219.

(a) In the same State, a deed, invalid as a lease and release, or covenant to stand seized, for want of the proper consideration, though the words used are "remise, release and quit-claim," is valid as a bargain and sale, if it expresses a pecuniary consideration, and evidently intends to convey *in presenti* all the grantor's estate. Lynch v. Livingston, 8 Barb. 463.

(b) It will be seen hereafter, (sec. 48,) that a contrary doctrine is adopted in Massachusetts. In Maine, a bargain and sale in fee, to take effect *in futuro*, is void. Otherwise, however, where a different intent appears, which can be effectuated consistently with the rules of law. Marden v. Chase, 32 Maine, 329.

A deed, showing that the bargainor lives on the land, and reserving "the use, occupation and control of it, during the lives of the grantor and his wife, for their support and maintenance," shows an intent that the reservation should be a restricted and qualified one, extending only to their necessary support and maintenance; and is not therefore void, as creating a fee *in futuro*. Ib.

(c) In Pennsylvania, it is held, that a use may be created by a recorded deed, without any consideration expressed. Sprague v. Woods 4 W. & Serg. 192. If the deed shows a

14. The pecuniary consideration, it seems, must be actual payment of money; a mere obligation to pay it is insufficient. Thus, where a bargain and sale, reciting that the bargainee had become bound for the bargainor in a bond and recognizance, for divers good causes and considerations, conveyed the land to the former; on proof that no money was paid, held, the deed was void. So, natural affection for a daughter, her promotion in marriage, and the increase of her portion, are not a sufficient consideration. So also, the payment of the bargainor's debts by the bargainee is no sufficient consideration, where it is to come out of the profits of the lands conveyed, for in such case no consideration comes from the bargainee. So a consideration of *other land* is insufficient.(1)

15. Where the grantor of an estate was an old and very intemperate man, and the only pecuniary consideration of the deed was a condition to be performed after the grantor's death, and the grantee was bound by no covenant to perform the conditions; held, although he took possession, (agreeing to pay rent,) this raised no binding implied contract; and the deed was void. (Both upon the grounds, it seems, of want of consideration, and that the deed was *in futuro*.) (2)(a)

16. But in a subsequent case, arising upon the same deed, in relation to a particular portion of the premises conveyed, the following additional clause was relied upon—"And the said B is to occupy and be in possession of my house, situate, &c., for which he is to allow me £60 a year, during my natural life." Another clause provided, that after the grantor's death, the grantee and his heirs should hold and enjoy, &c., and dispose thereof, &c. Held, this was a good conveyance of the house for the grantor's life, subject to rent, with a remainder to the grantee in fee without rent; or the deed operated as a *bargain and sale*, to take effect *in futuro*, the reservation of £60 being a sufficient consideration.(3)

17. At common law, no rent could be reserved upon a bargain and sale; because this created in the bargainee only a use, which was not subject to distress. But it is otherwise since the statute of uses; and a rent, reserved by this mode of conveyance, now constitutes a sufficient pecuniary consideration to render it valid, even where the reservation is by deed-poll, provided the bargainee takes possession, for he thereby subjects himself to an action of assumpsit for its recovery.(4)

(1) Ward v. Lambert, Cro. Eliz. 394; Osborn v. Churchman, Cro. Jac. 127; Crossing v. Scudamore, 1 Vent. 137; Lord Paget's case, 1 Leon. 194; Cheney v. Watkins, 1 Har. & J. 527; Jackson v. Hampton, 8 Ired. 457.

(2) Jackson v. Delancey, 4 Cow. 427; Jackson v. Florence, 16 John. 47; West v. Biscoe, 6 Har. & J. 460.

(3) Rogers v. Eagle, &c., 9 Wend. 611. (See 2 Fairf. 318.)

(4) 10 Co. 34 a; Co. Lit. 144 a; Corn. on Purch. Deeds, 16; Wykes v. Tyllard, Cro. Eliz. 595; Rogers v. Eagle, &c., 9 Wend. 618-9, 631; Sugd. 123.

consideration both of money and blood, a bargain and sale will be construed by equity into a covenant to stand seized. Ib. An unrecorded deed from a grandfather to his daughter and son-in-law, upon a consideration paid by them, and in trust for their children in fee, creates a use or trust for the children then living. Ib.

(a) In a later case, however, it is said to be *abundantly settled*, that a deed of bargain and sale, founded on a pecuniary consideration, to take effect *in futuro*, is valid. Jackson v. McKenny, 3 Wend. 235. It is added, that such deed is effectual *as a covenant to stand seized*. The marginal note is, "the deed, *being founded on a pecuniary consideration*, might take effect *in futuro*." Some obscurity arises from the fact, that the deed is spoken of as effectual, rather in consequence, than *in spite*, of the pecuniary consideration. (See secs. 13, 22.)

18. It is said, the consideration of a bargain and sale has become purely technical. A *penny*, a *peppercorn*, or *red rose*, is sufficient. Hence, where it is a *rent*, the time for which it is reserved is immaterial.(1)

19. To check the multiplication of secret conveyances, by means of a bargain and sale, after the statute of uses, another act, (27 Hen VIII, ch. 16,) was soon passed, requiring this conveyance to be made by deed, indented and publicly enrolled, or recorded. This act did not extend to deeds which could operate otherwise than as a bargain and sale; such as a feoffment, release, or covenant to stand seized; although, if *enrolled*, they might also operate in this way. Nor did it apply to estates for years.(2)

20. Another conveyance, operating by the statute of uses, and the only one, known to American law, which operates directly and solely in this way, is a *covenant to stand seized to uses*.(a) It is said, that, formerly, if one person covenanted for himself and his heirs, that for a certain consideration another should have his land; though the land did not pass for want of livery, yet the covenantee gained the use; and that a use thus acquired is now executed by the statute of uses. It would seem, however, that a mere covenant to convey cannot, in this country, operate to transfer the estate, but is only a *personal contract*, to be specifically enforced in equity, or made a foundation for damages at law.(3)

21. A covenant to stand seized to uses is ordinarily created by these precise words; though other words of conveyance, not of mere contract, may have the same effect, if conformable to the intention of the parties. Thus, the words "bargain and sell" have been held sufficient to create a covenant to stand seized.(4)

22. It is said, the four circumstances necessary to a covenant to stand seized are: 1. A sufficient and proper consideration, *blood or marriage* being the most common and suitable one; 2. A deed; 3. Seizin in fee; 4. Apt words to convey, such as *grant*, which creates a covenant, and raises a use.(5)

23. A settlement was made substantially as follows: "If I have no issue, and in case I die without lawful issue, I give, grant and confirm my land to A, to have and to hold to my use for life, then to the use of A in tail"—remainders over. Held, a good covenant to stand seized.(6)

23 a. Deed, as follows: "I, &c., for and in consideration of the love

(1) *Barker v. Keate*, Free. 250; 2 Ventr. 35.

(2) *Rogers v. Eagle, &c.*, 9 Wend. 627; 4 Cruise, 92-3; 2 Inst. 671-2; *Pidge v. Tyler*, 4 Mass. 543.

(3) 4 Cruise, 97; *Sharrington v. Strotton*, Plowd. 301-3; *Blithman's case*, Dyer, 55 a; *Doe v. Woodroffe*, 10 Mees. & W. 608.

(4) *Lade v. Baker*, 2 Ventr. 150; *Doe v. Salkeld*, Willes, 676; *Crossing v. Scudamore*, 1 Vent. 137; 1 Mod. 175; *French v. French*, 3 N. H. 261.

(5) *Vanhorn v. Harrison*, 1 Dall. 138; *Underwood v. Campbell*, 14 N. H. 393.

(6) *Harrison v. Austin*, 3 Mod. 237.

(a) It is said, this is no longer in use in England, (4 Kent, 492;) and intimated, that it is abolished in New York, as the statute of uses is there abolished, and no mention made in the Revised Statutes of this conveyance. Ib. So, also, the *bargain and sale* is said to be out of use in England, chiefly for the reason, applicable alike to the *covenant to stand seized*, that it is not adapted to *settlements*, because a consideration is necessary; nor, for the same reason, to persons not in *esse*. Ib. 496.

which I do bear towards my son, &c., give, grant unto, &c., all and singular, &c., and that said, &c., is to take possession of the same at Michaelmas day next. I have herewith delived him, &c., all and singular, the dwelling-house, &c., absolutely at Michaelmas day next, without any further condition respecting the property." Held, a covenant to stand seized.(1)

24. A, in consideration of his marriage with B, gave, granted, enfeoffed, aliened and confirmed lands to B and C for life, remainder to the heirs of the body of B by A, and covenanted that the lands should remain to these uses. Held, the deed was valid as a covenant to stand seized.(2)

25. So, where A conveyed to B, his son, his heirs and assigns, to have and to hold after the death of A, and covenanted that, after his death, B and his heirs should have the land; held, though void as a grant, being to commence *in futuro*, it was good as a covenant to stand seized.(3)

26. So, where one conveyed *in futuro* to his grandson—a valuable consideration being expressed—on condition of his doing certain acts after the commencement of his estate; held, a covenant to stand seized to the grantor's use till the estate commenced, and that the grantee then became seized, conditionally, without entry.(4)

27. The same principle has been applied, where a deed was given by a father to his son, and the grantor at the same time took back an instrument to secure himself a life estate. The whole was treated as one transaction. It was also held, that though the two instruments should be considered as distinct, the result must be the same; that from the relationship of the parties the consideration of blood might be averred, and the conveyance for life operate as a covenant to stand seized.(5)

28. So in New Hampshire it has been held, that the statute, providing that all conveyances, &c., signed, &c., and recorded, and *signed by two witnesses*, shall be valid to pass lands, *without any other act or ceremony*, was designed merely to free the people from the ceremony of livery and seizin, *in feoffments*, and does not apply to *conveyances to uses*, for which no livery was previously requisite; and therefore that a deed between father and son may take effect as a covenant to stand seized, though not attested by two witnesses.(6)(a)

29. So where a mother conveyed to two sons in fee, taking back a sealed instrument from one of them, declaring the intention to be, that she should hold and enjoy the land, and receive the rents, &c., for life, and covenanting to abide by such agreement; held, the two writings were parts of one contract, and might operate as a covenant to stand seized, and that the mother took a life estate.(7)

30. A grantor, in consideration of \$3,000, gave, granted, sold and

(1) *Starling v. Prince*, 5 Eng. L. & Equ. 428.

(2) *Doe v. Simpson*, 2 Wils. 22; *Doe v. Sal-keld*, Willes, 673.

(3) *Wallis v. Wallis*, 4 Mass. 136. See *Slater v. Dudley*, 8 Pick. 373.

(4) *Parker v. Nichols*, 7 Pick. 111; (*Wade*

v. Merwin, 11 Pick. 280; *King v. Barns*, 13, 24.)

(5) *French v. French*, 3 N. H. 258-9; 3 Wend. 233.

(6) *French v. French*, 3 N. H. 234; (*Cox v. Edwards*, 14 Mass. 491.)

(7) *Jackson v. McKenny*, 3 Wend. 233.

(a) The same principle has been settled as to a bargain and sale, where a pecuniary consideration is expressed. *Pritchard v. Brown*, 4 N. H. 405.

conveyed certain land, saving and reserving the right to use, occupy and enjoy it, during his natural life, free of all rent and charge whatever and all molestation in the same. The grantee had married the grantor's daughter, but she had died, leaving children, who were alive. Held, the relationship between the grantor and his grandchildren might be proved as the consideration of the deed, though a different one was expressed; and that it was sufficient to sustain the deed as a covenant to stand seized, though void as a feoffment, or bargain and sale.(1)

31. Deed from a father to his daughter, purporting to be for a pecuniary consideration, and to convey the fee-simple of certain land, but reserving the use and improvement to him for life. Held, though void as a bargain and sale, it was a good covenant to stand seized, the law presuming a consideration of blood; and that the daughter took, not a springing use, but a vested remainder.(2)

32. In Virginia, it has been held, that a deed defective as a feoffment, for want of livery, may take effect as a covenant to stand seized; and that after such deed, the grantor cannot, by a deed to a third person, convert his own possession into a possession adverse to the first grantee.(3) In Tennessee, the same principle of *effecting the object of a conveyance* has been carried to a greater extent than in any other State. It was there held, in case of a deed, by which A "hath given, granted, aliened and confirmed" to B, *after the death of A*, all his right, &c., that the intention of A to convey a present estate could not be doubted, or his intent to reserve a life estate to himself; and that to the execution of such intent there can be no valid objection. Were it otherwise, *then the condition would fall and the deed stand*. The grantor could not say, I inserted a condition destructive to your supposed title, and you take nothing.(4) So, in Connecticut, a conveyance in fee, reserving to the grantor the use and enjoyment for his life, is valid. But this is by virtue of the covenant in the deed, which must be made also for the consideration of blood or marriage.(5)

33. The same principle has been recognized in South Carolina, in equity, and a deed by a mother to her children, reserving a part for her own use during her life, upheld, though its effect was to deprive children, subsequently born, of any share in the estate. A deed in favor of *a natural son* has received the same construction.(6)

34. But a deed will not operate as a covenant to stand seized, though containing the word *covenant*, if such construction seems contrary to the intent of the party.(7)

35. A, tenant in tail, covenanted with B, his son, in consideration of marriage, that after his death the land should descend, remain and be with the son, and the heirs of his body. Held, a mere executory contract, and not a covenant to stand seized to uses.(8)

36. A person covenanted, in consideration of natural affection, to stand seized to the use of himself for life, and after his death that the land should descend or remain to his cousin, in fee. Held, a mere covenant, which did not raise a use.(9)

(1) *Gale v. Coburn*, 18 Pick. 397.

(2) *Brewer v. Hardy*, 22 Pick. 376.

(3) *Rowletts v. Daniel*, 4 Munf. 473.

(4) *Cains v. Jones*, 5 Yerg. 249.

(5) *Barrett v. French*, 1 Conn. 354; *Bishop v. Selleck*, 1 Day, 300; 1 Swift, 77, 134.

(6) *Pledger v. David*, 4 Dessaus. 264.

(7) *Milledge v. Lamar*, Ib. 617.

(8) *Blithman's case*, *Dyer*, 55 a.

(9) *Englefield's case*, *Jenk.* 267; *Dyer*, 55 a; *Samon v. Jones*, 2 Vent. 318.

37. To convey by a covenant to stand seized, one must be capable of holding lands to uses. So the property must be of a kind in which a use may exist. And the covenantor must have a present interest in possession, remainder or reversion, because a use cannot arise out of a future ownership. Thus, if one joint tenant covenants that he will stand seized of the share of the other after the death of the latter; the covenant is void.(1)

38. The only *consideration*, sufficient to sustain a covenant to stand seized to uses, is that of natural affection to a child or *near* relative, or marriage; which consideration may be proved by parol evidence. The reason assigned for this peculiarity is, that this deed is of a private nature and valid without enrolment. But a deed from husband and wife to the husband of her sister, in consideration of love and affection, is valid. And it has been remarked in New York, that a covenant, &c., has been sustained in favor of a *cousin five degrees removed*.(2)(a)

38 *a*. Conveyance to a son-in-law of the grantor, who had issue by the grantor's daughter, both wife and child being dead at the time of the conveyance, in consideration of "the love and good will I bear, &c., as my son-in-law." Held, a good covenant to stand seized.(3)

38 *b*. But marriage between the grantee and the grantor's daughter is an insufficient consideration.(4)

39. A covenanted with B, his brother,—to the intent that the land might descend and remain to the heirs male of his body, and continue to such of the blood as should be named in the deed,—to stand seized to the use of himself for life, remainder to the use of B and his wife for their lives, remainder to his other brothers. Held, a good covenant to stand seized.(5)

40. The future wife of a son may fall within the consideration of blood and affection necessary to sustain a covenant to stand seized; for such covenant is made for the benefit of one's posterity, which must spring from a wife.(6)

41. Where a *wife* is the party to be benefitted, a covenant to stand seized will be valid, though no consideration is expressed, for it is implied from the relation of the parties. And such deed will take effect in favor of a wife, though it is also made for the benefit of children, and though the only consideration expressed in the deed, is that of affection for the latter; because the consideration implied is not *repugnant* to that expressed.(7)

42. A, in consideration of affection to B, his wife, and as a provision for her, covenanted to stand seized to the use of himself and her for their lives and that of the survivor, remainder to their issue, remainder to such person or persons as B should appoint; in default of appointment, to the use of C, nephew of A. Held, the consideration extended

(1) 4 Cruise, 97; Yelverton v. Yelverton, Cro. Eliz. 401; Barton's case, 2 Rolle's Abr. 790.

(2) Cheney v. Watkins, 1 Har. & J. 527; 4 Cruise, 98; Goodell v. Pierce, 2 Hill, 659; Blackerby v. Holton, 5 Dana, 521.

(3) Bell v. Scammon, 15 N. H. 381.

(4) Corwin v. Corwin, 9 Barb. 219.

(5) Sharington v. Strotton, Plowd. 300.

(6) Bould v. Winston, 2 Rolle's Abr. 786.

(7) Bedell's case, 7 Rep. 40; Jackson v. Swart, 20 John. 87.

(a) So in favor of a grandson. Stovall v. Barnett, 4 Lit. 207.

to C, on account of his relationship to A, and because he was named in the deed, although not as nephew.(1)

43. It has been held, that affection to an illegitimate or reputed child is not a sufficient consideration to support a covenant to stand seized to uses; and a subsequent conveyance for his benefit, made in fulfilment of a covenant in the original deed *for further assurance*, will also be invalid. But, in South Carolina, this principle has been questioned.(2)

44. The adopting the surname of the covenantor is not a sufficient consideration for a covenant to stand seized; nor ancient acquaintance, or being chamber-fellows, or entire friends.(3)

44 a. Certain heirs executed an instrument, by which they acquitted to one of the heirs all their interest in the estate. The instrument was not under seal, nor was any consideration expressed in it, nor was it attested. Held, it was not a covenant to stand seized, because there was no consideration of love and affection.(4)

45. A covenant to stand seized with a stranger is invalid, though made for the benefit of the covenantor's son.

46. A, by indenture between him and B, his son, of the one part, and C and D of the other part, in consideration of natural love to B, gave, granted and enfeoffed C and D to the use of A for life, remainder to B in tail, remainder over; and covenanted with C and D, that they should enjoy the land to these uses. Held void as a covenant to stand seized.(5)

47. It has been said, a covenant to stand seized cannot arise from a pecuniary consideration, though made with a near relation. The express consideration destroys the efficacy of the implied consideration of blood.(6)

48. But it has been held in Massachusetts, that a covenant to stand seized may be made for *valuable* consideration. But, in such case, it is in effect a *bargain and sale*, and must have all the requisites and qualities thereof; one of which is, that it must be to the use of the bargainee. It is further said, that when a conveyance is made, to vest *in futuro*, by a covenant to stand seized, the consideration must be marriage or consanguinity; for, if it were *valuable*, the grantee must take immediately, or the conveyance would be void; while, in the other case, there is no repugnancy in the grantor's continuing to hold after the deed.(7)

49. In an important and interesting case, which will be more particularly noticed hereafter,(a) Judge Story remarked, that even where a deed has a pecuniary consideration, and the grantee is a stranger both by blood and marriage, yet, if such grantee is a mere conduit or instrument for uses, which do in fact arise from blood and marriage, and he himself takes no interest, there seems much reason for holding, that the

(1) Goodtitle v. Petto, 2 Str. 934.

(2) Gerrarde v. Worseley, Dyer, 374; 2 Rolle's Abr. 785; Milledge v. Lamar, 4 Des-saus, 627. See Duke, &c., v. London, &c., 5 Bing. N. 27; (a case arising out of a grant made by Chas. II, to an illegitimate child, for the consideration of love and affection.)

(3) 4 Cruise, 99; Plow. 303; 2 Rolle's Abr. 783.

(4) Underwood v. Campbell, 14 N. H. 393.

(5) Hore v. Dix, 2 Vent. 319; Sid. 25; Smith v. Risley, Cro. Car. 529.

(6) Henry, &c., case, 11 Rep. 24 b; Bedell's case, 7, 39 b.

(7) Welsh v. Foster, 12 Mass. 93.

(a) See *Flem Covert*, deed of.

deed shall work effectually to the use of persons included within the consideration of blood and marriage.(1)

50. So it is held in New York, that a deed from a man to his sons, purporting to be founded upon a pecuniary consideration only, may operate as a covenant, &c. Also, that a deed may operate in the same way, where relationship forms the real consideration, and the pecuniary consideration expressed is merely formal. But, in a previous case in the same State, it was held, that where, in a deed made to a son-in-law, the consideration stated was as follows: "in consideration of the performances hereinafter mentioned," which performances were expressed by way of *conditions*, that were all to be performed after the grantor's death; the consideration of blood could not be averred, to give effect to the deed as a covenant, &c., and it was therefore void, being *in futuro*.(2)

51. The consideration of blood, which gives validity to immediate limitations in favor of relatives, will not extend to more remote limitations in the same instrument, in favor of strangers. The former will be valid, but the latter void. Thus, where lands were limited to relatives for the expressed object of retaining them in the family, remainder to the Queen; the remainder was held void. So, where the covenant to stand seized was made with several persons, one of whom was a brother of the covenantor; the deed was held to create a use in him, but not in the others, although the use was charged in their hands with trusts for the children of the covenantor.(3)

52. In case of a covenant to stand seized to uses, the estate remains in the covenantor till the uses arise. In this respect, a distinction is taken between this form of conveyance and a feoffment to uses. Thus, if A make a feoffment to the use of B for life, remainder to the use of C for life, remainder to the use of D in fee, and B disclaim the estate, it vests immediately in C. The whole estate passes by the feoffment, and all the uses are said to be created out of it, as from one root. Hence, while any of them remain, the feoffor cannot have the land. But, in case of a covenant to stand seized, each use is founded on a several consideration, and arises out of the seizin of the covenantor; and, therefore, when one fails, the others are not thereby enlarged or altered, but the covenantor takes the land.(4)

53. Under the 4th and 5th sections of the statute of uses, a rent may be created by a covenant to stand seized. Thus, where A, in consideration of natural love and affection, covenanted to stand seized to the use of himself for life, remainder to B, his son, in tail, and to the intent that B should have a rent from the land during A's life; held, the rent was validly created.(5)

54. A covenant to stand seized, made only for good consideration, is void against creditors and subsequent purchasers.(6)

55. There are one or two important principles, alike applicable to a bargain and sale, and covenant to stand seized. By each of these conveyances, one can pass no greater interest than he himself owns. The reason of this distinction between these conveyances and a feoffment is,

(1) *Durant v. Ritchie*, 4 Mas. 67-8.

(2) *Jackson v. Swart*, 20 John. 85; *Bank, &c. v. Housman*, 6 Paige, 526; *Jackson v. Delancey*, 4 Cow. 431.

(3) *Wiseman's case*, 2 Rep. 15 a; *Smith v.*

Risley, Cro. Car. 529; *Whaley v. Tankard*, 2 Lev. 52-4; 20 John. 88.

(4) *Chedington's case*, 1 Rep. 154 a.

(5) *Rivett v. Godson*, W. Jones, 179.

(6) *Welsh v. Foster*, 12 Mass. 93.

that a use can never exceed the estate of the party who is seized to the use, but for any such excess the limitation to uses is void.(1)

56. As the conveyances in question pass only a use, and as a use cannot be raised upon a use, it follows that a bargain and sale, or a covenant to stand seized, made to one person to the use of another, vests no legal estate in the latter. Thus, where A bargained and sold land to B in fee, to the use of A for life, held, the use was void. It would seem, however, that the limitation would be valid as a trust. And in Massachusetts, such limitation has been construed a feoffment, where the words of conveyance were, "give, grant, bargain, sell, enfeof and convey." So, where a conveyance was made by husband and wife of her land to a third person, to the use of the grantors during their joint lives, and of the survivor in fee; held, that, if necessary to give effect to the conveyance, it should be construed as a bargain and sale, although this would raise *a use upon a use*, and thereby give only an equitable interest to the grantors; that, as the deed contained no declaration, that unless it gave the grantors a *legal* estate, it should be utterly void, no such construction could be given to it, but the parties must be presumed to know and intend the legal effect of their own instrument.(2)

57. Another mode of conveyance, operating in part under the statute of uses, is a *lease and release*. This, though often recognized by statutes,(a) is for the most part unknown in practice in the United States, and therefore demands a comparatively brief notice. It was the mode universally in practice in New York, until the year 1788, when it became superseded by the deed of *bargain and sale*. It is also said to be the universal mode of conveyance in England.(3)

58. A lease and release is in fact a bargain and sale for a year, and a common law release, operating by way of enlargement. After the statute of uses, and the subsequent statute, requiring enrolment of deeds of bargain and sale, it became an object to transfer the use in land by some method not requiring the publicity of such enrolment, or of actual possession. The latter statute being held inapplicable to conveyances for years, this method was found, in making a bargain and sale for a year, and subsequently, a common law release, enlarging the estate of the bargainee into a fee. The release would take effect, though the bargainee never had actual possession, because the statute of uses, without possession, vested the actual estate in him, upon which the release could operate. This point, though once doubted, was at length fully settled.(4)

59. A lease and release may be made by a single deed, the law ar-

(1) 4 Cruise, 101; Gilb. Uses, 140; Seymour's case, 10 Rep. 95; Stapilton v. Stapilton, 1 Atk. 2.

(2) Tyrrell's case, Dyer, 155; Marshall v. Fisk, 6 Mass. 32; Thatcher v. Omans, 3 Pick. 524; Green v. Thomas, 2 Fairf. 321; Durant v. Ritchie, 4 Mass. 66, 8.

(3) Prest. on Convey. Vol. II, 4 Kent, 493,

4, 6. But, by St. 4 Vict. c. 21, a release has all the efficacy of a lease or release, in passing any freehold title.

(4) 4 Cruise, 102; Barker v. Keat, 2 Mod. 249, 252; Co. Lit. 271 b, n. 1; Lutwich v. Mitton, Cro. Jac. 604; Iseham v. Morrice, Cro. Car. 110; Barker v. Keete, 1 Freem. 251; Rogers v. Eagle, &c., 9 Wend. 627, 8.

(a) It is said not to be practised in Ohio, though named with a bargain and sale in the ordinance for the North West Territory. Walk. Intro. 349. So it is recognized by the Revised Statutes of North Carolina and Mississippi. (1 N. O. Rev. St. 269; Mississippi Rev. C. 459.) See Bing. on Infancy, (Am. ed.) Appendix.

ranging the distinct transfers contained therein, in the proper order of time to effect the object.(1)

• 60. The words demise, grant, and to farm let, for six months, reserving a pepper corn rent, have been held to make a good bargain and sale the foundation for a release.(2)

61. The recital of a lease, in a deed of release, is evidence of the former against the releasor, and those claiming under him.(3)

62. A remainder or reversion may be conveyed by lease and release; because, although *possession* is mentioned by the authorities as necessary, this means merely a *vested estate*.(4)

63. Incorporeal hereditaments may be conveyed by lease and release.(5)

64. Though a pecuniary consideration is necessary to the bargain and sale which precedes a release, yet such consideration may be merely nominal; as, for instance, the reservation of a peppercorn rent. And no consideration need be expressed in the release, this being a common law conveyance.(6)

65. Another class of conveyances to uses, are those which operate by transmutation of possession; including in England conveyances by fine, recovery and feoffment, and in this country being chiefly, if not wholly, *deeds of grant*, or *conveyances in fee-simple*. Where such conveyance is made to one person to the use of another, this is called a *declaration of uses*.(a)

66. No technical words are necessary to make a declaration of uses, but any which express the intention of the parties are sufficient. Thus, a will, though revoked, has been held a sufficient declaration of the uses of a feoffment. So, a bargain and sale without enrolment, or a feoffment without livery, or a covenant to stand seized without consideration, will declare the uses of a subsequent fine.(7)

67. It has already been seen, that the conveyances to uses not operating by change of possession, viz., *bargain and sale*, and a *covenant to stand seized*, are invalid without a pecuniary or other consideration. The same rule, however, does not apply in England to limitations to uses by fine and recovery, nor in this country, where fine and recovery are unknown, to limitations by grant or conveyance, to the use of persons other than the grantee. The reason of the distinction is, that the former class of conveyances are in theory mere *contracts*, which cannot be specifically enforced without the aid of a court of equity; and equity will not interpose in behalf of a gratuitous promisee; but, on the other hand, by a conveyance of the latter class, the land is actually transferred, and the grantee takes it only as charged and encumbered with the specified uses.(8)

(1) 1 Freem. 251.

(2) Barker v. Keat, 2 Mod. 252.

(3) Ford v. Grey, 6 Mod. 44; Cragg v. Norfolk, 2 Lev. 108.

(4) 2 Booth's Cas. & Opin. 144; Co. Lit. 270 a; 2 Ld. Ray. 798.

(5) 4 Cruise, 104.

(6) Barker v. Keate, 2 Mod. 252; Shortridge v. Lamplugh, 2 Ld. Ray. 798.

(7) Jones v. Morley, 1 Ld. Ray. 290; Nightingale v. Ferrers, 3 P. Wms. 209; Audley's case, Dyer, 166 n; Hussey's case, 1 Rolle's Abr. 614; Mytton v. Lutwich, W. Jones, 7; 12 Mod. 163; Gilb. Uses, 207.

(8) Co. Lit. 123 b, n. 8.

(a) In England, declarations to uses are commonly made by an instrument distinct from the legal conveyance. But in this country, it is believed, that such a practice is almost, if not wholly, unknown.

68. Where a use is raised by feoffment, the feoffor, having parted with the legal estate, cannot *stand seized* to the use of the feoffee.(1)

69. In England, where deeds are executed prior to fines or recoveries, they are called deeds to *lead the uses*; where subsequent to the fine or recovery, deeds to *declare the uses*.

70. It was held, before the statute of frauds, that although a deed to *lead uses* is merely directory, yet, if the fine or recovery afterwards takes place, the former cannot be contradicted by parol evidence of any subsequent agreement as to the uses. But a subsequent written declaration controls a prior one. So, if the fine or recovery varies from the deed to lead the uses, as to time or the quantity of land, parol evidence is admissible to contradict the deed, in regard to the uses, being merely explanatory of the deviation from its provisions. But, notwithstanding such deviation as to time, quantity, person, &c., the uses of the deed shall be complied with, unless another agreement is proved.(2)

71. Since the statute of frauds, all averments, respecting the intention of the parties to the conveyance, are excluded. Hence, where the uses are declared before the fine or recovery, they cannot be controlled by any declaration, or even by deed, after. But, where the fine or recovery is not had according to the deed, the latter may be controlled by a subsequent deed or writing.(3)

72. It was formerly doubted, whether, after a fine or recovery, without declaring uses, such declaration could be effected by a subsequent deed; because this would be to divest a *resulting use*, which had actually vested in the former owner. But in an early case the efficacy of such subsequent deed was sustained, and is now a well established principle.(a) But the deed must refer to, and coincide with, the prior recovery. And such deed may be controlled by a subsequent one.(4)

73. If an infant levies a fine and declares the uses of it, this declaration will bind him as well as the fine itself. But an agreement by an infant to levy a fine, or suffer a recovery, when he shall come of age, cannot be construed into a declaration of the uses of the fine or recovery.(5)

74. A married woman, joining her husband in a fine or recovery, may join in declaring the uses—though she be an infant. If the husband declare the uses alone, the wife is bound, unless she expressly dissent. If the wife declare them alone, the declaration is void. So, where the husband and wife make different declarations.(6)

75. If an idiot or lunatic is permitted to levy a fine or suffer a recovery, he may declare the uses of it. But in this case, as well as that of an infant, Chancery will relieve.(7)

(1) *Thatcher v. Oman*, 3 Pick. 532.

(2) *Countess of Rutland, &c.*, 5 Rep. 25.

(3) *Tregame v. Fletcher*, 2 Salk. 676; *Jones v. Morley*, 1 Ld. Ray. 287; *Fleetwood v. Templeman*, 2 Atk. 79; *Stapilton v. Stapilton*, 1 Atk. 2.

(4) *Basset's case*, Dyer, 136; *Dowman's case*, 9 Rep. 7 b; *Whetstone v. Wentworth*, 2 Rolle's Abr. 799; *Vavisor's case*, Dyer, 307.

(5) *Beckwith's case*, 2 Rep. 56; *Mary, &c.*, case, 10 Rep. 42 b; 4 Cruise, 115; *Frost v. Wolveston*, 1 Str. 94.

(6) 2 Rolle's Abr. 798; *Swanton v. Raven*, 3 Atk. 105; 2 Rep. 57 b; *Johnson v. Cotton*, Skin. 275; 4 Cruise, 116; 2 Rep. 56-7-8; *Durant v. Ritchie*, 4 Mas. 68.

(7) 4 Cruise, 117; *Anne, &c. v. Winchester*, Hob. 224.

(a) Statute 4 Anne, c. 16, sec. 15, provides that the same may still be done, notwithstanding the statute of frauds. *Bushel v. Burland*, 11 Mod. 196; *Gilb. Uses*, 116, n.

76. The parties, joining in a fine or recovery, may declare the uses, according to their respective interests in the land; as in the case of a tenant for life, and the remainder-man or reversioner. If two joint tenants join in a fine or recovery, and make different declarations of uses, the declaration of each shall be effectual for his respective share. If tenant for life, remainder-man in tail, and reversioner in fee, join in a fine or recovery, a declaration made by the two first will not bind the reversioner.(1)

77. A use may be limited upon a release which creates an estate; but not upon a release or confirmation, operating by way of *mitter le droit*. Hence, a use may be declared on a lease and release in fee, and will arise out of the seizin of the releasee.(2)

CHAPTER LXXXIII.

TITLE BY DEED. CONSTRUCTION OF DEEDS.

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| <p>1. Ancient, general rules of construction.</p> <p>16. Uncertainty and repugnancy avoids a deed.</p> <p>20. Deeds may operate in any way necessary to give them effect.</p> | <p>26. Parol evidence, whether admissible in the construction of deeds; declarations, acts and circumstances; ambiguities, &c.</p> <p>45. Mistakes in deeds, correction of, in law and equity.</p> |
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1. WITH respect to the construction of deeds, the old books furnish us with several quaint and concise maxims, which have always, in a great measure, retained their original authority. One of these maxims is, "*benignæ sunt faciendæ interpretationes chartarum propter simplicitatem laicorum, ut res magis valeat quam pereat.*" In other words, deeds shall be construed favorably, and as near the intent of the parties as possible, consistent with the rules of law. The words are not the principal things in a deed, but the intent and design of the parties.(a) But if such intention is repugnant to the rules of law, the latter shall prevail.

(1) 2 Rep. 57 b, 58 a; *Yelverton v. Yelverton*, Noy R. 20; *Argall v. Cheney*, Palm. 405; *Roe v. Popham*, Doug. 24. (2) *Samme's case*, 13 Rep. 55; 4 Cruise, 118.

(a) It is worthy of notice, that this rule, of regarding the intention, is almost always spoken of as peculiarly applicable to *devises*, and as one of the most important points of distinction between *devises* and *deeds*. Yet it would be difficult to express the controlling authority of the rule more strongly than is done in the text, in relation to *deeds*.

Where there is no controversy as to the facts, it is a mere question of law, what land was intended to be conveyed. *Stevens v. Hollister*, 18 Vt. 294.

In general, a deed will be construed by the "*lex rei sitæ*," or the law of the place where the land lies. But the Court of the United States have held, that they are not thus bound by the local law. *Thomas v. Hatch*, 3 Sumn. 170; *Moore v. Griffin*, 9 Shepl. 350. As to the peculiar force of *decided cases* in reference to *real estate*, see *Bel lows v. Parsons*, 13 N. H. 256. See also, *Perkins v. Dickinson*, 3 Gratt. 335; *Doe v. Bernard*, 7 S. & M. 319.

Thus, a limitation to one *and his heirs* for 21 years will pass the estate to his executors; because an estate for years is in law a *chattel*.(1)

2. Another maxim is, "*quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba expressa fienda est*;" or, in other words, no construction shall control the effect of clear and unambiguous expressions. But, on the other hand, "*qui hæret in litera hæret in cortice*;" and, therefore, if the intention is clear, the precise and exact signification of words shall not prevail against it. The *leading* intent shall be effected, if consistent with the terms of the deed.(2)

3. "*Ex antecedentibus et consequentibus fit optima interpretatio*." A deed shall be construed all together, and not by single clauses, and the whole shall take effect, if possible. Thus, although the *covenants* cannot enlarge the estate granted in the *premises*; yet they may be resorted to for the purpose of aiding in the construction, when a question arises as to what is granted.(3) But it is held, that a provision relative to one subject cannot be taken therefrom and applied to another, in order to give a different meaning to the instrument.(4) Upon a similar principle, two deeds executed at the same time shall, for many purposes, be regarded as one instrument; more particularly where one refers to the other; and as between the original parties and their representatives.(a) A familiar instance of this rule is the case of a deed and mortgage back, which so far constitute one conveyance, that the widow of the grantee can have dower, only subject to the mortgage. So, where A conveys to B, and on the same day B to C, as parts of one transaction, although A's deed refers to B's for a description of the land, this circumstance has no tendency to show that B had no title when he conveyed to C, but both deeds are construed as parts of the same instrument.(5) So, several conveyances may constitute parts of the same transaction, although they do not bear the same date, and although the parties are not the same.(6)

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| <p>(1) <i>Bridge v. Wellington</i>, 1 Mass. 219; <i>Wallis v. Wallis</i>, 4, 135; <i>Ellis v. Welch</i>, 6, 246; <i>Davis v. Hayden</i>, 9, 518; 17, 289; <i>Gibson v. Tyson</i>, 5 Watts, 41; <i>Thomas v. Hatch</i>, 3 Sumn. 170; <i>Solly v. Forbes</i>, 4 Moore, 448; Co. Lit. 36 a; <i>Plow</i>. 154, 160; <i>Doe v. Roe</i>, 1 John. Cas. 402; 4 Cruise, 205; <i>Howard v. Rogers</i>, 4 Har. & J. 278; Co. Lit. 46 b; <i>Wade v. Howard</i>, 11 Pick. 295; <i>Norton v. Leonard</i>, 12, 157. (See <i>Craft v. Webster</i>, 4 Rawle, 258.) <i>Means v. Presbyterian, &c.</i>, 3 Watts & S. 303; <i>Davis v. Taul</i>, 6 Dana, 53; <i>Lincoln v. Wilder</i>, 29 Maine, 169; <i>Cornell v. Todd</i>, 2 Denio, 130; <i>Foy v. Neal</i>, 2 Strobb. 156.</p> <p>(2) <i>Lanyon v. Carne</i>, 2 Saun. 167; <i>Jackson v. Myers</i>, 3 John. 395; — <i>v. Blodget</i>, 16,</p> | <p>178; <i>Means v. Presbyterian, &c.</i>, 3 Watts & S. 303.</p> <p>(3) <i>Mills v. Catlin</i>, 22 Verm. 98.</p> <p>(4) <i>Kea v. Robeson</i>, 5 Ired. 373.</p> <p>(5) <i>Eaton v. Campbell</i>, 7 Pick. 10; <i>Hills v. Miller</i>, 3 Paige, 254; <i>Thompson v. McClenachan</i>, 17 S. & R. 110; <i>Bosworth v. Farland</i>, Carter, 98, 112; <i>Butler v. Duncomb</i>, 1 P. Wms. 457; 16 John. 178; <i>King v. King</i>, 7 Mass. 496; <i>Quarles v. Quarles</i>, 4, 687; 4 Moore, 448; <i>Allen v. Brazier</i>, 2 Bai. 55; <i>Dismukes v. Wright</i>, 4 Dev. & B. 206; <i>Doe v. Porter</i>, 3 Pike, 18; <i>Jameson v. Palmer</i>, 7 Shepl. 425; 9, 350; <i>Mills v. Catlin</i>, 22 Verm. 98; <i>Cloyes v. Sweetzer</i>, 4 Cush. 403; <i>Lewis v. Baird</i>, 3 McL. 56; <i>Deering v. Longwharf</i>, 25 Maine, 51; <i>Foy v. Neal</i>, 2 Strobb. 156.</p> <p>(6) <i>Gammon v. Freeman</i>, 31 Maine, 243.</p> |
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(a) But identity as to parties and the date alone is not sufficient. The papers must appear on their face, or by competent extrinsic evidence, to relate to the same transaction. *Cornell v. Todd*, 2 Denio, 130.

A party derived title to two adjoining parcels of land, by a separate conveyance for each parcel, from the same grantor, and bearing the same date, but which did not refer to each other. By one of the conveyances, a piece of land, which was parcel of the premises conveyed by the other deed, was in terms excepted. Held, that each conveyance must stand by itself, and that the exception, not being for a part of the thing granted by the deed in which it was contained, was void. *Id.*

4. Upon the same principle, where property is first delivered; and then a deed made of it, the whole is one transaction, and the deed the best evidence of title.(1)

5. "*Verba posteriora, propter certitudinem addita, ad priora, quæ certitudine indigent, sunt referenda.*" And, if certainty once appears, and it is afterwards spoken indifferently, reference shall be had to the certainty.(2) (See *infra*, c. 84.)

6. The whole of a deed shall stand, if possible; if not, a prior clause shall be sustained, in preference to a subsequent one.(a) But, it is said, the rule of rejecting a clause for repugnancy is merely technical, and not to be acted upon but in the last resort. Also, that the *prior* clause is to be considered as that one which ought to have precedence in effect.(3)

7. "*Quando charta continet generalem clausulam, postea que descendit ad verba specialia quæ clausulæ generali sunt consentanea; interpretanda est charta secundum verba specialia.*" If a general clause and subsequent special words are accordant, the construction shall be according to the latter words. On the other hand, "*generalis clausula non porrigitur ad ea quæ antea specialiter sunt comprehensa.*" Hence, when a deed contains special words, and subsequent general words, both shall stand.(4) (See *infra*, c. 84.)

8. "*Mala grammatica non vitiat chartam.*" Neither bad Latin nor bad English renders a deed void.(5)

9. The law will arrange the clauses of a deed in such a way as to effect the object of the parties. Thus, if in a lease the reservation of rent precedes the *habendum*, this order will be inverted, and the rent treated as reserved for the whole term of the *habendum*. (*Infra*, ch. 84.) So it has been held, that a clause following the warranty, but referring to the former consideration, and transferring therefor the residue of the survey not before conveyed, passes the estate.(6) But words cannot be transposed in order to give effect to a deed, unless it contain something which shows that the intention will otherwise be defeated.(7)

10. "*Idem semper refertur proximo antecedenti.*" Thus a limitation to A in tail, remainder to B "*in eadem forma,*" gives B an estate tail. But a limitation to A for life, remainder to B in tail, remainder to C *in forma prædicta*, is void (as to C) for uncertainty.(8)

11. Ancient charters are to be taken according to ancient usage; and being before time of memory, and having been used since, are to be sustained, though according to present rules insufficient and void.(9)

(1) *Foster v. Cherry*, 2 Nott & McC. 367.

(2) *Hix v. Fleetwood*, 4 Leon. 248.

(3) *Cother v. Essex*, Hard. 94; *Bridgewater v. Bolton*, 6 Mod. 107; *Tufts v. Cutler*, 3 Pick. 276; *Gould v. Womack*, 2 Ala. (N. S.) 83; *Doe v. Porter*, 3 Pike, 18; *City, &c. v. Illinois, &c.*, 12 Illin. 38; *Clough v. Bowman*, 15 N. H. 204.

(4) *Knight v. Cole*, Carth. 120.

(5) 6 Rep. 38 b; *Cromwell v. Rumsden*, 1 Ld. Ray. 585.

(6) *Sutton, &c.*, 10 Rep. 28 a; *Attoe v. Hemmings*, 2 Bulst. 282; *Noel v. Dishman*, 4 Bibb. 51.

(7) *Kea v. Robeson*, 5 Ired. Equ. 373.

(8) Co. Lit. 20 b.

(9) Bro. Abr. Grants, 89; *Livingston v. Ten Broeck*, 16 John. 23, 178; *Codman v. Winslow*, 10 Mass. 149; *Adams v. Frothingham*, 3, 361; Co. Lit. 183 a; 16 John. 14.

12. A deed is always construed most strongly against the grantor. "*Verba chartæ fortius accipiuntur contra proferentem; et quælibet concessio fortissime contra donatorem interpretanda est.*"(a) This rule is founded upon an obvious reason of policy; because, if ambiguous expressions were to be construed in favor of the grantor or party using them, such language would be intentionally and fraudulently employed. This rule, however, does not apply to an indenture, which is the act, and contains the language, equally of the grantee, and the grantor.(1)(b) And it is said not to apply to grants from the government.(2) (See ch. 64.)

13. Where a deed admits of two constructions—the one conformable, and the other contrary to law; the former is preferred. Thus, if tenant in tail convey *for life*, it shall be construed, for his own life. So, also, a deed will be so construed, if possible, as to avoid a forfeiture.(3)

14. The word *and* may sometimes be construed to mean *or*, and *vice versa*, to effect the intention of the parties. Thus, where a lessor for 21 years covenanted to renew the lease to the lessee *and his assigns*; the lessee having died, held, his executors were entitled to a new lease upon the expiration of the old one. So, a grant to one "or his heirs," shall be construed "*and his heirs*," if the intent so require.(4) So, the use of the word *with*, instead of *to*, before the grantee's name, does not avoid the deed.(5)

15. Words repugnant to other parts of the deed, and to the general intent, will be rejected.(6)

16. Though it is an established rule, that a deed shall be so construed "*ut res magis valeat quam pereat*," yet the language must control. Hence, where the terms of a deed are so uncertain, unmeaning or re-

(1) Tenny v. Beard, 5 N. H. 58; 4 Cruise, 203-4; Thomas v. Ward, 1 Leon. 246; Skipworth v. Green, 8 Mod. 312; 16 John. 178; 4 Mass. 205; Howard v. Rogers, 4 Har. & J. 278; Doe v. Porter, 3 Pike, 18; Coheco, &c. v. Whittier, 10 N. H. 305; Mills v. Catlin, 22 Verm. 98; Lincoln v. Wilder, 29 Maine, 169; City, &c. v. Illinois, &c., 12 Illin. 38; Clough v. Bowman, 15 N. H. 204; Foy v. Neal, 2 Strobb. 156.

(2) Jackson v. Reeves, 3 Caines, 293.

(3) Co. Lit. 42 a, 183 a, b; Jackson v. Topping, 1 Wend. 388.

(4) Jackson v. Topping, 1 Wend. 388; Chapman v. Dalton, Plow. 289; Co. Lit. 225 a; White v. Crawford, 10 Mass. 183; Stubbs v. Sargon, 2 Keen, 255.

(5) Brooks v. Ratcliff, 11 Ired. 321.

(6) 4 Cruise, 205.

(a) Upon the trial of a prisoner for aiding a slave to abscond from his master, the prisoner produced a deed of emancipation from the master to the slave. Held, if it was doubtful, upon the construction of the deed, whether it was effectual as such, the prisoner was entitled to the benefit of the doubt. Logan's Case, 2 Gratt. 571.

(b) But see Goodwin v. Gilbert, 9 Mass. 514; Phelps v. Townsend, 8 Pick. 392; Flagg v. Flagg, 11, 475, that the acceptance of a deed-poll creates an obligation on the part of the grantee. The same principle applies to a devisee or the grantee of a devisee. Felch v. Taylor, 13 Pick. 133. Assumpsit lies against them, or covenant. Ib.; Ralph v. Strickland, Cro. Jac. 240; 8 Pick. 287; Finley v. Simpson, 2 N. J. 311. And sometimes case. Burnett v. Lynch, 8 Dow. & R. 368; (Infra, ch. 86.) See Guild v. Leonard, 18 Pick. 511; Newell v. Hill, 2 Met. 180. Contra, as to the action of covenant, Benbury v. Benbury, 2 Dev. & B. Eq. 239. This action is held not to lie against a lessee, where the lessor only signed or sealed the lease. Trustees v. Spencer, 7 Ohio, 149; Hinsdale v. Humphrey, 15 Conn. 431.

So, where a grantee assumes payment of a mortgage upon the land as part of the consideration, and purchases subject thereto; he is bound in equity to indemnify the grantor against the mortgage, and the latter, if compelled to pay it, has a personal claim against him. So, also, the facts furnish sufficient consideration for a promise from a purchaser to the mortgagee. Dorr v. Peters, 3 Edw. 132. Conveyance to a town—"and it is for the use of a burying-place; if the land shall be enclosed by a fence, the same is to be done by the inhabitants aforesaid." The town accepted the deed and built a division fence. Held, they were bound to maintain such fence. Minor v. Deland, 18 Pick. 266.

pugnant, that its intention cannot be discovered, it is void; as, for instance, a deed to A or B; or to one of the children of A, who has four children. So, a grant to A, B and C, or *either, habendum* to them or *either*, upon trust for creditors, &c. So, where the description of the land is illegible or wholly uncertain. But if certain in part and uncertain in other parts, a deed is not therefore void.(1)

17. Demise to A, *habendum* to A, and B, C and D *successive*. Held, A alone could take an immediate estate, the others being named in the *habendum* only; and that they could not take by way of remainder, because the word *successive* prevented them from taking together, and the order in which the estate should come to them was left wholly undetermined.(2)

18. A constable, who had sold part of a lot of land for taxes, thus described it in his deed: "a certain tract of land, part of lot No. 300, containing 250 acres." Held, the deed was void for uncertainty. So, the sale of 190 acres, part of a tract of 600, is void for uncertainty.(3)

19. It is said, where the parts of a deed are mutually repugnant, the intent shall prevail.(4) Also, that a deed is avoided only by such uncertainty, as makes it impossible to tell what estate is granted, or who is first to take.(5)

19 a. A sale, for taxes, of one acre of land, without describing its form, "off the east side of" a lot of one hundred and fifty acres, granted by the United States to a settler thereon, but the boundaries of which have not been ascertained; is void for uncertainty.(6)

19 b. Grant of "the tract of land at the point of the flag-staff." Held, void for uncertainty.(7)

19 c. Where land is conveyed by a sheriff upon a sale on execution, and two distinct parcels are found, equally answering the description in the deed, the conveyance will be held inoperative, for the reason that it was intended to pass but one, and it cannot be determined which was intended.(8)

20. It was remarked by Lord Mansfield, that the rules laid down in respect of the construction of deeds were founded in law, reason and common sense. Hence, where a deed for any reason cannot operate as the kind of instrument intended by the parties, it shall be held to operate, if possible, in some other way. "*Quando quod ago non valet ut ago, valeat quantum valere potest.*" A deed shall never be laid aside as void, if by any construction it can be made good. Thus, a bargain and sale, or lease and release, ineffectual *as such*, may take effect as a covenant to stand seized. So a bargain and sale, void for want of a pecuniary consideration, may operate as a *confirmation*. Thus, where a father, in consideration of love to his son, who was in possession, bargained, sold, gave, granted and confirmed to him in fee, and the deed was enrolled; held, though void by way of use, the deed was good as a con-

(1) *Duncan v. Beard*, 2 Nott & M'C. 400; Co. Lit. 20 b; 4 Mass. 205; *Jackson v. Ransom*, 18 John. 107; *Law v. Hempstead*, 10 Conn. 23; *Wright v. Pond*. Ib. 255; *Doe v. Porter*, 3 Pike, 18; *Kea v. Robeson*, 5 Ired. Equ. 373.

(2) *Windsore v. Hobart*, Hob. 313.

(3) *Haven v. Cram*. 1 N. H. 93. See Can-

ning *v. Pinkham*, Ib. 353; *Marmaduke v. Tennant*, 4 B. Monr. 211.

(4) *State v. Trask*, 6 Verm. 355.

(5) *Pearse v. Owens*, 2 Hayw. 234.

(6) *Ballance v. Forsyth*, 13 How. 18.

(7) *Commyns v. Latimer*, 2 Flori. 71.

(8) *Mason v. White*, 11 Barb. 173.

firmation.(1) (See *supra*, *Feoffment, Bargain and Sale, Covenant to stand Seized.*)

21. So a lease and release, void as such, because the estate is less than freehold, may operate as a grant and assignment of the term.

22. A, having a long term, and being in possession, by lease and release, granted, bargained, sold and demised the land to trustees and their heirs, to the use of himself and his wife for life, remainder to her heirs, covenanting that he had the fee. Held, though no use vested in the trustees, the statute of uses applying only to freeholds, and therefore the release had no estate to operate upon; yet the deed, containing the word grant, might take effect as a grant or assignment of the term at common law.(2)

23. It seems, a release may operate as a grant, where a reversion is the subject of transfer, though the word *grant* is not used. Thus, where a reversioner by deed of release renounced, remised, released and forever quit-claimed to A, in tail male, the premises and all his right, title, and interest therein; it was strongly intimated by Lord Mansfield, that the instrument might take effect as a grant, though this word was not used, as in other similar cases; but the case was decided upon another point. So, a release may operate as a bargain and sale.(3)

24. In England, a deed of bargain and sale, made for a pecuniary consideration, though not enrolled, may be good, and may be enforced in equity, as a covenant to convey; or, it may operate as a grant of the reversion, where the land is in possession of lessees.(4)

25. It is the modern practice, to insert in a conveyance all the operative terms used in transferring land—as *grant, bargain, sell, release and confirm*, in order that the instrument may take effect in one way if not in another. In such case, the party receiving the deed has his election in what way to take it. Thus, if the words used are *dedi et concessi*, he may claim either by grant, feoffment, gift, lease, release, confirmation or surrender. So, where one for money demises, grants, bargains and sells for years; the grantee may claim by demise or by bargain, and the right of election continues, notwithstanding a subsequent transfer by the owner, and his death afterwards, and passes to the heir or executor of the grantee. But, in such a case, it is said, till election, the party takes the estate at common law, and not by bargain and sale.(5)

25 *a*. In some cases, the rule above stated, as to giving effect to a deed in one way, if it cannot operate in another, has been held inapplicable.

25 *b*. Certain of the heirs to an estate executed an instrument, acquitting to one of the heirs all their interest in the estate. The instrument was not under seal, nor was any consideration expressed in it, nor was it attested by witnesses. Held, void under the statute of frauds, as an agreement to convey, for want of a consideration expressed; as a deed, under the Statute of 1791, because not sealed or witnessed; as a bar-

(1) *Goodtitle v. Bailey*, Cowp. 597; *Clanrichard, &c.*, Hob. 277; *Jackson v. Schoonmaker*, 2 John. 233-34; 16 John. 178; 2 Nott & M'C. 400; *Osborn v. Churchman*, Cro. Jac. 127.

(2) *Marshall v. Franks*, Gilb. R. 143; *Baker v. Whiting*, 3 Sumn. 475.

(3) *Goodtitle v. Bailey*, Cowp. 597.

(4) *Mestaer v. Gillespie*, 11 Ves. 625; *Dee v. Cole*, 7 Barn. & C. 243.

(5) *Touch. 83*; *Heyward's case*, 2 Rep. 35; *Co. Lit.* 145 a; *Darrell v. Gunter*, W. Jones, 266; 2 Rolle's Abr. 787, pl. 7; 16 John. 178; *Jackson v. Hudson*, 3, 375.

gain and sale, for want of a seal; and as a covenant to stand seized, because there was no consideration of love and affection.(1)(a)

26. It is said, that against a consideration alleged in a deed or a use declared, no averment to the contrary can be received.(2) The rule of law, which excludes parol evidence to vary or contradict written agreements,(b) founded both upon the common law and the statute of frauds, is alike applicable to sealed and unsealed writings, whether relating to land or other matters; and therefore does not seem to require special remark in treating of the *construction of deeds*. It seems sufficient to notice the principles and some of the cases upon the subject, which, though illustrative of the general rule, relate particularly to conveyances of land.

27. It was agreed between A and B, in writing, that B should take the grass and vesture of hay upon land of A. Held, parol evidence was inadmissible, that B was to have the land itself, and also another parcel of land, by virtue of a parol agreement made at the same time with the writing. So, a parol agreement, previous or subsequent to the execution of a deed, cannot be shown, in order to extend well defined boundaries. So, a deed, specifying one reservation, and silent as to the postponement of possession, excludes any verbal stipulation to that effect.(3)

28. So, where land is let at a certain rent, in an action against the executor of the lessee, parol evidence is inadmissible, that the lessee, in addition to this rent, agreed to pay the ground rent to the ground landlord. It seems, this evidence would be admitted, in connection with proof that the lessee had actually paid the ground rent. The circumstance, that the additional rent is to be paid to a third person, does not alter the general principle.(4)

29. Debt for rent, upon a lease for nine years, rendering rent. Parol evidence is admissible of an agreement, that for the last nine months no rent should be paid.(5)

30. A condition or trust cannot be coupled, by parol evidence, with a deed on its face absolute.(6)

30 a. Persons who are not parties to a deed, or privies in estate, may,

(1) *Underwood v. Campbell*, 14 N. H. 393.

(2) *Jenk.* 166; 4 *Har. & J.* 278; *Partridge v. Powlet*, 2 *Atk.* 384; 15 *Pick.* 69; *Revere v. Leonard*, 1 *Mass.* 91; *Howe v. Bass*, 2, 380; 15, 85; *Den. v. Monjoy*, 2 *Halst.* 173; *Hodges v. Hodges*, 2 *Cush.* 455; *Rathbun v. Rathbun*, 16 *Barb.* 98; *Bank, &c. v. Whyte*, 1 *Md. Ch.* 536. (But see *Thomp-*

son v. Mc'Clenachan, 17 *S. & R.* 113; *Rich v. Elliott*, 10 *Verm.* 211.)

(3) *Meres v. Ansell*, 3 *Wils.* 270; *Pasley v. English*, 5 *Gratt.* 141; *Cathcart v. Chandler*, 5 *Strobh.* 19.

(4) *Preston v. Merceau*, 2 *Black. R.* 1249.

(5) *Hultz v. Wright*, 16 *S. & R.* 345.

(6) *Flint v. Sheldon*, 13 *Mass.* 443. (See *Maccubbin v. Cromwell*, 7 *Gill & J.* 157.)

(a) An instrument, containing a power of attorney, to transact business in relation to all lands granted and to be given to the constituent by Congress, &c., and to take the same into possession, as the attorney's own property, containing, also, the following clause:—"I do hereby grant, bargain and sell, the said lands to A, (the attorney,) his heirs and assigns, forever;" was held a bargain and sale, and to transfer a lot subsequently patented to the constituent, as a revolutionary soldier. *Wilson v. Betts*, 4 *Denio*, 201.

(b) Somewhat different rules upon this subject prevail in law and equity. Thus, where an issue was awarded by a court of equity, to determine the genuineness of the signature of the grantor to a deed, and his competency at the time to execute it; and the jury found in favor of the deed, but the evidence showed that the grantor's intention was to produce a result entirely different from that effected by the deed as it was written; a new trial was ordered. *Lansing v. Russell*, 3 *Barb. Ch.* 325.

in case they have an interest in the subject matter, which may be injuriously or fraudulently affected, if the truth cannot be shown, prove by parol the true character of the transaction, although the parties and their privies would be estopped from doing so.(1)

31. It is the general rule, that *collateral facts*, tending to explain or support a deed, may be proved by parol evidence.(a) As, for instance,

(1) *Taylor v. Baldwin*, 10 Barb. 582.

(a) It is held in New York that, after a sale on execution, and deed to a purchaser, extrinsic evidence cannot be resorted to of the intent of the sheriff in making the sale; the rules applicable to a deed *inter partes* do not apply. *Mason v. White*, 11 Barb. 173.

Extrinsic circumstances may be resorted to, to explain the terms used in a sheriff's deed, and to locate the premises described; but only for the purpose of establishing and carrying out the intent expressed. *Ib.*

The general rules of law upon this subject have been somewhat modified, with reference to a *division or partition* of land between joint owners, or the establishment of boundary lines between adjoining owners.

Parties, whose lands join, may agree upon a dividing line between them by parol, and establish monuments, and this will bind them until they make a subsequent agreement. But possession up to a line, established for temporary purposes only, is not evidence of title. *Clough v. Bowman*, 15 N. H. 504.

A parol agreement, fixing a dividing line and its position, with possession immediately following, is conclusive, and is not within the statute of frauds. *Lindsay v. Springer*, 4 Harring. 547.

It has been held, that partition may be presumed from a long several holding by heirs of one ancestor. So, in North Carolina, that partition without deed is valid, if made by livery of seizin on the land. And, in New York, if followed by separate possession. In South Carolina, not unless thus perfected. *Slize v. Derrick*, 2 Rich. 627; *McCall v. Reybold*, 1 Harring. 146; *Walker v. Bernard*, Cam. & N. 82; *Anders v. Anders*, 2 Dev. 532; *Corbin v. Jackson*, 14 Wend. 619; *Ryerss v. Wheeler*, 25, 434. See *McCann v. Edwards*, 6 B. Mon. 208.

But in Massachusetts, a parol partition by joint tenants, &c., is void, being within the Statute of Frauds; and, notwithstanding a several occupancy, they remain jointly seized; for a partition by deed cannot be inferred from a several possession in fact. Such partition is not a question of law, but of fact, for the jury. *Porter v. Perkins*, 5 Mass. 233; *Porter v. Hill*, 9, 34. See *Folger v. Mitchell*, 3 Pick. 396.

But if there is an ambiguity in deeds of partition between tenants in common, as to the boundary meant to be established, parol evidence is admissible, that, two years before, they agreed to divide the land, surveyed it, made a wall conformable to the line thus settled, and ever after occupied, respectively, upon each side of the wall. And this evidence cannot be controlled by parol proof, that, when the survey was made, they agreed to divide the land into equal parts, but by mistake the wall was wrongly located. *Crafts v. Hibbard*, 4 Met. 438. See *Gray v. Berry*, 9 N. H. 473. *Hobbs v. Parker*, 31 Maine, 143. If one tenant, occupying alone, sow the land, and while the crops are growing partition is made, each tenant will own that part of the crop growing upon his own property. *Calhoun v. Curtis*, 4 Met. 413. A covenant between tenants in common, that a certain parcel of their land shall be occupied by them, their heirs, &c., in common, as a yard, is no bar to a petition for partition. Neither party can on this ground maintain the plea of sole seizin; and partition will not vary the previous right of occupancy. *Fisher v. Dewerson*, 3 Met. 544; acc. *Black v. Tyler*, 1 Pick. 150. Where parties leave a question of boundary to arbitration, by a parol submission, the award is binding, and settles their rights. *Bowon v. Cooper*, 7 Watts, 311.

A, B and C, owners of lands adjoining to, and with the right reserved by will of passing and repassing over and upon, the lands of D and E, in order to cart "sea-weed and sand, at any time when they should see fit, and tip it out in a heap, where it should be most convenient and least prejudicial, and cart it off at their leisure," together with D and E, submitted, by rule of court, to referees, their differences of opinion as to the nature and effect of the above named reservations and privileges, contained in the will, and as to the manner of enjoying the same, with all questions growing out of the intent and meaning of said will; and the referees reported thereon, declaring the legal effect of the reservations in the will, and prescribing the manner of collecting, depositing in heaps, and carting across the lands of said D and E the above mentioned sea-weed and sand, which report was confirmed by the court. Held, said report only defined and settled the joint rights of the parties, and provided for their enjoyment as joint rights, and did not operate as a partition. *Bailey v. Sisson*, 1 R. I. L. 233.

the payment of a pecuniary consideration, in case of a bargain and sale. So, in case of a lease, it may be shown, by parol evidence, who is to repair, nothing being expressed upon the subject. But the term cannot be shortened or increased, nor the rent enlarged.(1) So, it is held, that to contradict a deed by showing a mistake in the person who wrote it, evidence is inadmissible of matters which did not take place *at or about the time*, and of which it did not appear that the person to be affected was cognizant.(2) So, where a lease is made by A to B, for one year, parol evidence is inadmissible that, on the day on which the lease was made, but after its execution, it was agreed that B should occupy until the affairs between A and a third person were settled, and that these affairs had not been settled, although two years had elapsed.(3)

32. Where the consideration named was £28, parol evidence was received that the true consideration was £30.(4)

- (1) Cheyney's case, 5 Rep. 68 b; Mildmay's case, 1 Rep. 176 a; 2 Rolle's Abr. 786, N. pl. 1; Preston v. Merceau, 2 Black. R. 1249; Hall v. Leonard, 1 Pick. 27; Scanlan v. Wright, 13, 530; Sanders v. Filley, 12, 554; Gibson v. Tyson, 5 Watts, 34; Hodges v. Strong, 10 Verm. 247; Fish v. Hubbard, 21 Wend. 651; Pride v. Lunt, 1 Appl. 115.
 (2) Wager v. Chew, 3 Harris, 323.
 (3) Wheeler v. Cowan, 25 Maine, 283.
 (4) King v. Scammonden, 3 T. R. 474.

The proprietors of certain land, held in common and undivided, who managed the same as a corporation, under the act of 1786, c. 53, (Rev. Sts. c. 43, secs. 20, 43,) caused the land to be surveyed and divided into lots, and partition to be made among the several proprietors, and entered, with a plan of the same, upon the records of the proprietary, which partition, not being made in conformity with the statute, had only the effect of a partition by parol. The proprietor, to whom lot number one was assigned, conveyed a portion thereof to one who was not a proprietor; and the residue of the same was seized on execution and set off to a creditor of such proprietor, who was himself a proprietor. The proprietors subsequently made partition by deed, according to the above division, in which the whole of lot No. 1, (the original proprietor having fled the country, and his grantee not being a proprietor,) was conveyed to the execution creditor, who never made any claim to that part of the lot which had been conveyed by the original proprietor, but suffered the grantee thereof, and those claiming under him, to remain in possession. Held, the deed from the original proprietor of lot number one, of a part thereof, was not void, but voidable only by his covenants; and that the proceedings of the proprietors, instead of disaffirming, were a confirmation of the same. *Dall v. Brown*, 5 Cush. 289.

All the tenants in common of a lot of land, except one absent, made a parol partition, in which, at the request of one of those present, the share of the absent one was set off together with his, and actual and exclusive possession was taken of the several shares by those to whom they were allotted. Held, the absent one might, after the lapse of sixteen years, maintain ejectment for his share against the one who had had it allotted to himself. [*Burnside, J.*, dissenting.] *McMahan v. McMahan*, 1 Harris, 376.

Held, also, that the entry of the defendant, on all the land set off to him, was such a part performance as would take the case out of the statute of frauds, although he had, during the life, and with the permission of the last owner, occupied a part of the land afterwards allotted to him.

A parol agreement respecting the boundary between adjacent lands is not binding, where there was a previous definite boundary, and the party setting up such agreement had not, at the time of making it, a valid title to the land claimed by him. *Lewallen v. Overton*, 9 Humph. 76.

The mere acquiescence in a line, as a dividing line between adjoining proprietors, for fifteen years, although but one of them, and perhaps neither, is in actual possession, is sufficient to establish it as the true line, if known and claimed by both proprietors. *Brown v. Edson*, 23 Verm. 435.

In South Carolina, a parol partition will be enforced, if already partly executed. *Goodhue v. Barnwell*, Rice, 198. Where adjoining owners agree by parol, upon a line of partition, and occupy accordingly, but under a mistake of boundary; there is no estoppel, especially if no valuable improvements have been made. *Tolman v. Sparhawk*, 5 Met. 469. Where four persons purchased land, and agreed upon streets and lots according to a plan, and died; it was held, that the estate was not subject to partition. *Peck v. Cordwell*, 2 Beav. 137.

33. In the construction of a grant, the court will take into view the attendant circumstances, the situation of the parties, the state of the country, and of the thing granted. So, if the terms of a deed are doubtful as to the boundaries. But a specific location in a deed, as, for instance, adjoining a certain river, cannot be contradicted by parol evidence, unless there is a latent ambiguity.(1)(a)

34. Ancient, and perhaps other writings and titles, may be explained by extrinsic evidence of a practical construction as to boundary and extent; which may be proved by actual occupation. So, the boundaries of an ancient grant by course and distance may be enlarged, by proof of a usage of surveyors in a neighboring township, to overrun the measurement.(2)

35. The acts and declarations of parties, as to the *location* of land, may control courses and distances in a deed; though the parties were ignorant that they could have this effect. But, where certain land is legally included in a deed, the purchaser's ignorance of this fact, and his afterwards speaking of it as belonging to the seller, have no effect upon his title, unless third persons have been affected.(b)

36. Acquiescence in an erroneous location for eighteen years, is conclusive upon a party making or acquiescing in such location.(3)

37. Some authorities favor the doctrine, that a deed cannot be construed by the acts of the parties, or other extraneous circumstances, unless the words are doubtful. This leads us to speak briefly of *ambiguities*.(4)(c)

38. Ambiguities are either *patent* or *latent*. Where an ambiguity is *patent*, or apparent upon the face of the deed, without reference to any extrinsic proof; it cannot be explained by parol evidence, and avoids the deed.(5)(d)

(1) *Adams v. Frothingham*, 3 Mass. 352; 4, 205; *Leland v. Stone*, 10, 459; *Nichols v. Lewis*, 15 Conn. 137. See *Hobbs v. Parker*, 31 Maine, 143.

(2) *Codman v. Winslow*, 10 Mass. 146; *Owen v. Bartholomew*, 9 Pick. 520; *Livingston v. Ten Broeck*, 16 John. 14; *Clark v. Munyan*, 22 Pick. 410; *Bolick v. Bolick*, 1 Ired. 244.

(3) *Rockwell v. Adams*, 6 Wend. 467; *Anderson v. Nesbit*, 2 Rawle, 114; *Christine v. Whitehill*, 16 S. & R. 98; *Frost v. Spaulding*, 19 Pick. 445.

(4) 4 Cruise, 205; *Miller v. Bristol*, 12 Pick. 554; *Howard v. Rogers*, 4 Har. & J. 278.

(5) *Storer v. Freeman*, 6 Mass. 435; 8, 83; *Stackpole v. Arnold*, 11, 29; 15, 85; *Cutler v. Tufts*, 3 Pick. 273; *Dybert v. Platts*, 25 Wend. 402. See *Becton v. Chesnut*, 4 Dev. & B. 335; *Haydon v. Ewing*, 1 B. Monr. 113; *Clayton v. Nugent*, 13 Mees. & W. 200; *Bradley v. Washington, &c.*, 13 Pet. 89; *Hiscocks v. Hiscocks*, 5 Mees. & W. 363; *Richmond v. Farquhar*, 8 Blackf. 89; *Weeks v. Eaton*, 15 N. H. 145.

(a) Evidence has been received, that by the word *river*, the parties did not intend the ordinary meaning of the term. *Greenleaf v. Kitton*, 11 N. H. 530.

(b) In the construction of a devise, evidence is admissible of the testator's marking out the lot devised, and this boundary shall prevail over the quantity stated in the will. *Hunt v. Devling*, 8 Watts, 403.

(c) It has been held, that where the terms of a deed are equivocal, resort may be had to evidence of the declarations and claim of right of the party, under the deed, and those from whom he claims title. And where the terms of the deed are not equivocal, and the court give to it the proper construction, it is not ground of error that such evidence was received, when no use was made of it, unless as a guide to the court. *Adams v. Warner*, 23 Verm. 395.

Where the description of the premises is sufficiently certain, by reference to other deeds, and monuments existing when those deeds were made, evidence that the grantor, when he executed the deed, pointed out a monument as the boundary, which was not the true one, would not amount to a practical location, nor limit the deed to the monument, there being no agreement or assent on the part of the grantee. *Clough v. Bowman*, 15 N. H. 504.

(d) But it has been held, that where there is an inconsistency between the date and the

39. But where an ambiguity arises from some fact disclosed by parol evidence, it may be explained or removed by evidence of the same kind. Thus, if one convey *the manor of S.*, and it is proved that there are two manors of this name, a north and a south manor, parol evidence is admissible to show which was meant. So land and monuments, referred to as boundaries, may be located by parol evidence. So where there are two persons of the same name, father and son, in the same town, and one of this name is grantee, it may be shown by parol proof that the son was intended. (See ch. 84, sec. 17.) And where words are used, having a fixed meaning, but still varying according to the subject contemplated by the parties; this is held to constitute an intermediate class of ambiguities, open to explanation by parol evidence.(1)

39 a. Where there are two or more monuments, either of which may be that designated, parol evidence is admissible to show which is the one intended. But this may be settled by a farther description in the deed, showing which is the true boundary.(2) So where, by the registered title, the divisional line of lands is described to be at a mark, a given distance from a monument, and the place of the mark is not identified, such given distance may be controlled by other evidence as to the locality of the line.(3)

40. Where a deed gives a description which has not acquired a fixed legal construction, or refers to a boundary which is variable; parol evidence is admissible to explain the deed. Thus, a deed bounded the land *upon a pond*, which, being identified by the terms of the deed, proved to be a natural pond, the height of which was varied at different times by means of a dam. Held, parol evidence was admissible, that the parties agreed upon a certain line as the boundary.(4)

41. Deed of land adjoining the town of M., "described on the map as *swamp land*," but no such land appeared on the map. Held, parol evidence was admissible to explain the deed.(5)

42. By ancient deed, the privilege of cutting timber was granted, to be used for *building* upon the land. Held, it might be proved, in construction of the deed, that the grantee had with the grantor's knowledge cut timber for fences.(6)

43. It is said the construction of a grant is for the court, and not for the jury, except in case of latent ambiguity.(7)(a)

(1) *Harding v. Suffolk*, 1 Rep. in Cha. 74; Big. Dig. 212; *Wing v. Burgis*, 1 Shepl. 111; 4 Har. & J. 278; *Collins v. Lemasters*, 2 Bai. 141; *Coit v. Starkweather*, 8 Conn. 289; *Putnam v. Smith*, 4 Verm. 622; *Crafts v. Hibbard*, 4 Met. 438; *Atkinson v. Cummins*, 9 How. 479; *Barton v. Morris*, 15 Ohio, 408.

(2) *Clough v. Bowman*, 15 N. H. 204.

(3) *Moulton v. Powers*, 32 Maine, 375.

(4) *Waterman v. Johnson*, 13 Pick. 261; *Overton v. Woolfolk*, 6 Dana, 371; *Railroad, &c. v. Ormsby*, 7, 276; *Morton v. Jackson*, 1 Sm. & M. 494; *Eveleth v. Wilson*, 3 Shepl. 109.

(5) *Morton v. Jackson*, 1 Sm. & M. 494.

(6) *Livingston v. Ten Broeck*, 16 John. 14.

(7) *Thomas v. Godfrey*, 3 Gill & J. 142; *Harris v. Doe*, 4 Blackf. 377.

recital of a deed, parol evidence is admissible to explain it. *Kelly v. Thompson*, 7 Watts, 401. Omissions will not be supplied by mere conjecture. *Dismukes v. Wright*, 4 Dev. & B. 206. It is said, in a late case, "the court are not bound to find out a meaning for a proviso framed as this is." *Doe v. Carew*, 2 Ad. & El. (N. S.) 321. On the other hand, if there is no ambiguity on the face of the deed, it cannot be rendered uncertain by extrinsic facts, nor parol evidence received to contradict the description. *Bratton v. Clawson*, 3 Strobb. 127.

(a) The construction of a grant is matter of law. But its legal effects, deducible from its terms or from matter subsequent, whereby it is enlarged or abridged so as to include or exclude certain premises, is matter for the jury. *Frier v. Jackson*, 8 John. 495. See *infra*, ch.

44. It is said, though a deed refer to extrinsic matter, the explanation of which requires parol evidence, such evidence is not admissible to explain or contradict the deed itself.(1)

45. In equity, where a material part of an agreement has been fraudulently omitted, or the intention of the parties mistaken by the drawer of the deed; parol evidence is admitted.(2)

46. But the mistake must be clearly and strongly proved, before the court can correct a deed.(3)

47. It seems to have been held, even at law, that an evident omission or mistake in a deed may be supplied by other evidence. Such evidence is also admissible in case of *fraud*. This rule has been applied to the omission of the name of the grantor, in the granting part of the deed. Thus, where a deed was made by A to B, for the purpose of making him tenant to the *præcipe*, and the deed showed that the consideration was paid to A, and that the object was to bar entails and remainders, and assure the land to A by a common recovery; and both the deed and other evidence showed that the land belonged to A; but the name of A was omitted in the bargaining part of the deed; held, it was still a valid conveyance.(4)(a) (But see *infra*, ch. 84, s. 148.)

48. Where a trust deed is made by a debtor to secure a debt to A, and B's name is used by mistake, and the mistake clearly proved, equity will order the money paid in the first instance to A. So, where words of inheritance are omitted by mistake, Chancery will supply them.(5)(b)

49. So where a deed contains successive limitations, which are arranged in an order contrary to the evident intent of the parties, Chancery will transpose this arrangement. Thus, where a marriage settlement, after estates for life to the husband and wife, limited remainders,

(1) *South, &c. v. Johnson*, 1 McCord, 41; (*Milling v. Crankfield*, *Ibid.* 258.)

(2) 4 Cruise, 212-13. See *Parteriche v. Powlter*, 2 Atk. 384; 10 Pick. 279; *Cozens v. Stevenson*, 5 S. & R. 424; *Snyder v. Snyder*, 6 Binn. 483.

(3) *Sowerbye v. Arden*, 1 John. Cha. 252.

(4) *Christine v. Whitehill*, 16 S. & R. 98; *Lloyd v. Say*, 1 Salk. 341; 10 Mod. 40; 4 Bro. Parl. Cas. 73. See *Tyrell v. Comstock*, 10 Conn. 210.

(5) *McCall v. Harrison*, 1 Brock. 26; 10 Conn. 243; *Peters v. Goodrich*, 3 Ib. 146.

84, sec. 92, n. The jury may be rightly instructed, that if they believe from the evidence, looking to the monuments, length of lines, quantities, actual occupation, &c., that it was more probable that the parties "intended to include the demanded premises than otherwise," they should find a verdict accordingly. *Reed v. Proprs., &c.*, 8 How. 274.

(a) A covenant, omitting the name of the covenantor, has been held void. *Day v. Brown*, 3 Ohio, 45. But, where the name of the grantor was omitted in the granting part of the deed, which contained covenants, and was signed by husband and wife; held, it seems, the deed was good. *Carr v. Williams*, 10 Ohio, 305.

(b) Parol testimony is admissible, in equity, to explain a deed, in case of mistake in drawing it, though it is to be received with great caution. *Lauderdale v. Hallock*, 7 S. & M. 622. *Ross v. Wilson*, 7 S. & M. 753.

Where one brings an action at law founded upon an alleged mistake in a deed; although parol evidence of the mistake is not admissible in such action, further proceedings therein may be stayed, to give the plaintiff an opportunity of filing a bill in equity to correct the mistake. *Prescott v. Hawkins*, 12 N. H. 19.

Description by metes and bounds, the same containing about 5 3-4 acres, be the same more or less. Held, the purchaser might prove by parol, that the contract was for so many acres, at a specified price per acre, and that a mutual mistake was made in the measurement, by which the quantity was supposed to be larger than it really was; and might maintain an action for money had and received, to recover the excess of his payment over the contract price. *White v. Miller*, 22 Verm. 380.

first to the sons in tail male, and then to trustees for years, to raise portions for younger children, and declared the trust of the term to be a support for such children from the husband's death, and payment of the portions of the younger sons at 21, and of the daughters at 21 or marriage; upon a bill in equity to correct an error in the settlement, after a recovery suffered by the tenant in tail; held, the limitation to trustees should be placed before that to the sons in tail.(1) (*Supra*, s. 9.)

50. Chancery will correct a deed, as well where it is offered in defence, as where it is the subject of relief by bill.(2)

51. It has already been stated (Vol. I. ch. 20,) that, in some respects, different rules of construction are applied to conveyances at common law, and those operating under the statute of uses. The latter class of deeds have sometimes been placed on the same footing with devises, in which it will be seen that great liberality is allowed.(3) But a more strict rule is now adopted, in deeds to uses, with respect to mere words of *limitation*, though words regulating or modifying the estate are still liberally construed. It is said that a deed to uses is not to be construed so beneficially for the grantee since, as before, the statute of uses, because this statute turns a use into a legal estate to all intents and purposes.(4) And the settled doctrine is now stated to be, that conveyances to uses and deeds at common law are to be construed in the same manner.

52. The construction given to a *declaration of trust* will depend upon the particular form or mode in which the trust is created. If the deed is final, definitely fixing the trust, so that the only future change must be a mere transfer by the trustee, for the purpose of clothing the equitable estate with a corresponding legal title; in other words, if the trust is an *executed* one; the instrument is construed no less strictly than a legal conveyance. If, on the other hand, the trust is *executory*, or left open, to be established and completed by a future conveyance, to which reference is made in the original deed; in decreeing such conveyance, the original deed will be liberally construed, according to the intention.(5)

53. Upon the same principle, *articles of agreement* are always construed liberally in Chancery; being regarded as mere minutes or memoranda, drawn up by parties, to be submitted to counsel for their guidance in preparing a conveyance. The rule is particularly applicable to marriage articles. And, where a marriage settlement contains a covenant to convey, it will be constructed like an article of agreement.(6)

(1) *Uvedale v. Halfpenny*, 2 P. Wms. 151; *Targus v. Puget*, 2 Ves. 195; *Desell v. Casey*, 3 Des. Cha. 84.

(2) *Chamberlain v. Thompson*, 10 Conn. 243.

(3) *Carter v. Ringstead*, Cro. Eliz. 208; *Leigh v. Brace*, Carth. 343; *Rigden v. Vallier*, 2 Ves. 252.

(4) 2 Booth, 279; *Pearse v. Owens*, 2

Hayw. 234; 2 Bro. 233; *Doe v. Morgan*, 3 T. R. 765; *Alpass v. Watkins*, 8, 519; 4 Cruise, 215.

(5) *Fearne*, 218; *Roberts v. Dixwell*, 1 Atk. 608; *Maryat v. Townly*, 1 Ves. 103.

(6) *Blandford v. Marlborough*, 2 Atk. 545; 2 Col. Jurid. 374; 4 Cruise, 215; *West v. Biscoe*, 6 Har. & J. 460.

CHAPTER LXXXIV.

TITLE BY DEED. CONSTRUCTION. FORMAL PARTS OF A DEED.

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| 1. Clauses in a deed. | 47. Definitions of terms of description. |
| 2. <i>Premises</i> ; what. | 62. What passes as appurtenant; easements, mills, ways, &c. |
| 3. Date, whether necessary or conclusive. | 71. Miscellaneous examples of rights pertaining to land. |
| 10. Parties, when bound. | 73. Description by <i>reference</i> . |
| 12. How described; whether a name is necessary, &c.* | 84. General and special descriptions; erroneous additions, &c. |
| 19. Deeds from and to <i>heirs</i> ; <i>heirs female</i> , &c. | 93. Boundaries; specific monuments; course and distance; quantity of land, &c. |
| 24. Corporations and associations, how described. | 116. Description, whether a warranty. |
| 30. <i>Recital</i> , how far, and upon whom binding. | 121. Miscellaneous examples. |
| 39. Consideration, &c. | 130. Land bounded upon water. |
| 40. Description of property conveyed; what sufficient. | 134. <i>Exception, reservation, &c.</i> |
| | 148. <i>Habendum</i> . |

1. HAVING considered the rules of law relating to the construction of deeds in general, we proceed to enumerate and explain the several parts or clauses of a conveyance, and the principles by which they are to be interpreted. This inquiry has been in part anticipated in the introductory chapter, describing the general nature and requisites of a deed of lands.

2. The technical meaning of *the premises* in a deed, is everything which precedes the *habendum*. The premises, in fact, include the most material particulars of the instrument. They determine the subject matter of the deed.(1)

3. *The date* of a deed is no part of its substance, and not necessary to be inserted; but it is the invariable usage for deeds to be dated, and the date is *prima facie* evidence of the time of execution. Otherwise, where it is shown that a deed was antedated.(2)

3 a. Ejectment for dower. It appeared that the husband had been long seized, and the defendant, for the purpose of showing a conveyance prior to the marriage, produced a deed from him, dated four months before that event, but proved to have been subsequently executed, and intentionally antedated, and proved and recorded some time after the marriage; but the subscribing witness could not fix the time of execution. Held, the defendant was bound to show its actual execution to have been prior to the marriage; and also, that the fact of antedating the deed furnished a presumption that it was executed after the marriage, and that an earlier date was inserted to overreach the title to dower.(3)(a)

(1) Sumner v. Williams, 8 Mass. 174; Lyerly v. Wheeler, 12 Ired. 290; Castigan v. Manning v. Smith, 6 Conn. 289. Gould, 5 Denio, 290.

(2) Jackson v. Schoonmaker, 2 John. 234; (3) Castigan v. Gould, 5 Denio, 290.

(a) So, although, in general, declarations of a person after he has made a deed cannot be received to impeach it, where it appears that the deed was dated back, the declarations of the grantor made before the real date, though after the date on the face of the deed, are evidence of the fraudulent intent of the parties. Ward v. Saunders, 6 Iredell, 382.

4. The *date* of a deed usually mentions the year and day of the month. It may be either at the beginning or the end. The former is usually the case with indentures; the latter with deeds-poll. Where the date in the body of the deed differs from that at the foot, the latter prevails.(1)

5. It is said, a date in *figures* is less to be regarded than one in a different form.(2)

6. It is said, that formerly deeds were not dated; for the reason, that a deed dated before the period of prescription, which was constantly changing, was supposed not to be pleadable. But ever since the reign of Edward II, deeds have been dated.(3)

7. It has been seen, that, in the absence of any date, a deed operates from delivery.(4)

8. Where a deed, purporting to be made by trustees, was dated in 1714, and the grantors were not trustees in that year, but in 1717; this fact was held sufficient proof of a mistake in the date, and the conveyance was held valid.(5)

9. Several deeds take effect according to priority of date, or delivery, or registry. If constituting parts of one agreement, the law supposes such priority as will best effect the intention.(6) (See ch. 83, sec. 6.)

10. With regard to *the parties* to a deed, where, of several grantors or grantees, a part are capable of conveying or receiving the estate, and a part incapable, the deed shall be good as to the former, though invalid as to the latter.(7.)

11. A deed does not bind one who signs and seals it, unless it contain words expressive of an intent to be bound. Thus, a wife's right of dower is not released, though she execute the deed of her husband, unless it contains words of release.(8)

12. The parties to a deed are usually described by their Christian and surnames, occupation and residence. Strict accuracy in this respect, though usual and desirable, is not absolutely necessary. It is enough that the party can be identified and distinguished from all others. Where there is a double name, one part of it only will be sufficient to give effect to the deed. If the Christian name is mistaken, but the title or office correctly stated, and the latter is such as can belong to but one person—as, in England, the Earl of Pembroke; this is sufficient. So the conveyance may be made to a *wife*, without any Christian name, or even by a wrong name. But a grant by a Christian name or a surname alone is generally void, unless aided by other parts of the deed, or by some subsequent act.(9)(a)

(1) 4 Cruise, 216; Colquhoun v. Atkinsons, 6 Munf. 550; Morrison v. Caldwell, 5 Monr. 433.

(2) Jackson v. Schoonmaker, 2 John. 233; Geiss v. Odenheimer, 4 Yeates, 278.

(3) 4 Cruise, 216; Co. Lit. 6 a.

(4) 4 Barn & C. 908.

(5) Jackson v. Schoonmaker, 2 John. 230.

(6) Taylor v. Horde, 1 Burr. 106.

(7) Co. Lit. 45 a; Touch. 81.

(8) Catlin v. Ware, 9 Mass. 220.

(9) Greely v. Steele, 2 N. H. 284; 10 Pick. 367; Brac. 188 b; Co. Lit. 3 a; The King v. Chester, Carth. 440; Sowle v. Sowle, 10 Pick. 376; Dunn v. Gaimes, 1 McL. 321.

(a) A deed, made by mistake to a party well named, cannot at law enure to another party, though an intention to that effect may be fairly inferred from the face of the deed. Den v. Hay, 1 N. J. 174.

A deed is valid to pass the fee, though in the granting part the grantor is also named as grantee; where it describes the grantor as the "party of the first part," and the grantee as

13. A conveyance by an heir in his own name, but subscribed by him *as executor*, is valid, no will being proved to exist.(1)

14. A conveyance to *A and son*, being a mercantile firm, it seems, passes an interest to the son.(2)

15. A remainder may be, and often is, limited, without the name of the party who is to take—as, for instance, to *the eldest son of A*.(3)

16. A name acquired by reputation is a sufficient designation; as in the case of a bastard.(4)(a)

17. Where a conveyance is made to a female, and a person formerly bearing the name of the grantee now bears another name, having been married; parol evidence is admissible, to prove that she is the party intended, that the grantor was ignorant of her marriage, and that she was the only one claiming to bear the name in the deed, or claiming title under it.(5)

18. A soldier conveyed lands by indorsement upon his discharge, as “the 600 acres due me from the public, as a soldier in *Col. Lamb’s regiment of artillery*.” He was, in fact, a soldier in a different regiment. Held, the words in italics should be rejected as surplusage.(6)

19. A grant to *the heirs* of one deceased is good. The parties who are to take may be ascertained by extrinsic evidence. But a conveyance to *the heirs* of one living is void. The intention of the grantor in such case cannot be ascertained.(b) It is left doubtful, whether after-born children are to take, whether the deed is to operate immediately, or at the death of the father, and whether, if there be no children, brothers and sisters can take. So a conveyance by an heir apparent is void.(7) (See Vol. I, *Reversioner*.)

20. A remainder to the right heirs of A and B, upon the death of A and B, passes to their heirs as tenants in common. But if A and B are husband and wife, it goes to their joint heirs, or their children.(8)

21. Where a party to a deed is described as *heir at law of A*, a surviving devisee of the legal estate, this description is no evidence of the prior death of co-devisees, or that such party is heir of A, even against another party to the deed.(9)

22. An estate may be limited by the word *heir*.(10)

(1) *Maverick v. Austin*, 1 Bai. 59.

(2) *Hoffman v. Porter*, 2 Brock. 156.

(3) Co. Lit. 3 a.

(4) *Ib.*

(5) *Scanlan v. Wright*, 13 Pick. 523.

(6) *Jackson v. Root*, 18 John. 60.

(7) 4 Cruise, 218; *Shaw v. Loud*, 12 Mass. 447; *Hall v. Leonard*, 1 Pick. 27; *Perk. 52*;

Davis v. Hayden; 9 Mass. 514; *Boone v. Moore*, 14 Mis. 420. (See *Kitchens v. Craig*, 1 Bai. 119.) 1 Pirt. Dig. 255.

(8) 2 Rolle’s Abr. 417, pl. 6; *Roe v. Quartley*, 1 T. R. 630.

(9) *Doe v. Dodd*, 2 Nev. & M. 838.

(10) 4 Cruise, 218. See the *State v. Engle*, 1 N. J. 347.

the party of the second part, with an *habendum* clause, to the latter. In such case, the estate passes in fee to the party, who is to have and to hold the premises. *Irwin v. Longworth*, 20 Ohio, 581.

A conveyance in such case is good, where the grantee is described by sufficient terms to designate who is intended, though neither his christian or surname is used. *Ib.*

Where there is no grantee named in the granting part of a deed, the party named in the *habendum* may take. Where the grantor is named as grantee, the same rule applies as if no grantee were named in the premises. *Ib.*

(a) Devise, to A for life, and her daughter, B, in fee. At the making of the will, A had an illegitimate daughter, B, her legitimate daughter of that name having died six years before. Held, parol evidence was admissible, that the testator did not know of the death of the latter, but intended the devise for her. *Doe v. Beynon*, 4 P. & Dav. 193.

(b) Where a note was given, payable to “the heirs of A,” A being alive; held, the presumptive heir of A could recover on the note. *Cox v. Beltzhoover*, 11 Mis. 142.

23. Lord Coke says, where there is a limitation to *the heirs female of the body*, a daughter cannot take the estate, there being also a son; because she corresponds to only one part of the description, viz., the word *female*, and not to the other, the word *heirs*. But this rule has been doubted, though sustained by Mr. Hargrave in his notes to Coke upon Littleton.(1)

23 a. Deed to the heirs of A "agreeable to the will" of A. No will was produced. Held, the deed was valid.(2)

23 b. The words "legal representatives," used in a deed, cannot be acted upon by the court, unless some context be found in the deed to explain them.(3)

24. The description of a *corporation* must be such as to identify it. It is said the only essential circumstances, or the four first principles of substance, are the *names of persons*, of *houses*, *foundations* or *dedications*. But the grant of a corporation is not void by reason of any variance in *addition*, *interposition*, *omission* or *commutation*.(4) (See ch. 80, sec. 55 & sequ.)

25. A grant to the parishioners or inhabitants of a dale, or the commoners of a waste, or the churchwardens of a parish, is held void for uncertainty.(5)

26. In New York, where a grant is made to individuals for the use of a church, not incorporated, the grantees stand seized to the use; and, upon subsequent incorporation, the use becomes executed, and the estate vests.(6)

27. A grant to "the inhabitants of a neighborhood," which is not defined with sufficient certainty, is void.(7)

28. So a conveyance, to "a settlement of Friends on the west side of S. lake," is too vague and uncertain to constitute a competent grantee at law, or *cestui que use*, whose estate the statute will execute. *A fortiori*, where the grant is to A, B and C, *for themselves and their associates*, being the settlement aforesaid, the persons named take the legal estate, and the associates only an equity.(8)

29. But in South Carolina it has been held, that a grant by a British governor of an uninhabited tract, to A *and his associates*, is not void for uncertainty. The word *associates* might be construed to mean *assigns*, or such persons as should choose to associate with A, and to whom he might therefore convey.(9)(a)

(1) Co. Lit. 23 b, n. 3; Beckford v. Pendarvis, 5 Bro. Parl. 93; Co. Lit. 164 a, n.; Goodtitle v. Burtenshaw, Fearn, Appen. No. 1.

(2) Gearheart v. Sharp, 9 B. Mon. 31.

(3) Tipping v. Howard, 6 Eng. L. & Eq. 99.

(4) Fanshaw's case, Moo. 235.

(5) Shep. Touch. 235-6.

(6) Reformed, &c. v. Veeder, 4 Wend. 494.

(7) Thomas v. Marshfield, 10 Pick. 367.

(8) Jackson v. Sisson, 2 John. Cas. 321.

(9) Duncan v. Beard, 2 Nott & M'C. 400; Williams v. Claiborne, 7 S. & M. 488.

(a) Indenture between A and B of the one part and "the school-house and its employers;" (describing its location;) "in consideration of love, &c., to the school-house and the congregation or employers thereof, have given, granted, aliened, enfeoffed and confirmed, &c., to the school-house and congregation, &c.—*herbendum* to the school-house and congregation or employers, to the only proper use of the school-house for ever." Held, the deed conveyed no legal title, because there was no grantee, nor the consideration requisite for a bargain and sale; but it was a valid *declaration of trust*, and the legal estate passed to the oldest son of the owner at his death. Morrison v. Beirer, 2 Watts & S. 81.

Deed to "A, B & C, trustees of the D. E. congregation, their successors and assigns," said congregation being a religious corporation. Held, that by this deed, the legal title was vested in A, B and C, individually, and not in the corporation. Den v. Hay, 1 New Jersey, 174.

30. *The recital* in a deed is a part not absolutely necessary, but commonly used to explain the title of the grantor, and the circumstances and reasons of the conveyance. It is said, the recitals are a key of the construction, where the operative part is doubtfully expressed, not otherwise. And they shall not control the latter, though less specific than the recital, where the plain intent would be thereby defeated.(1)

31. A mis-recital does not avoid the deed; more especially if immaterial and irrelevant; if not repugnant, inconsistent or illegal. As where the grant of a reversion mis-recites the commencement of the prior lease; or a deed mis-recites the grantor's estate, or the date of the prior deed to himself.(2)

32. Lord Coke says, a recital does not conclude, because it is no direct affirmation. But it has been held, that the recital of a particular fact binds the party making it, *by estoppel*. Thus, if the condition of a bond recites that the obligor has received sums of money for the obligee, for which he has not accounted, but is still indebted, he is estopped to deny the receipt of any money. (See *Estoppel*.) A recital binds the grantee only as to the land conveyed.(3)(a)

33. A recital in a deed cannot operate on one who is neither party nor privy to it. Nor is the party to a deed bound by recitals in other deeds, through which he derived title. So, if one execute a deed reciting a former one, to which he is a party, but which he has not executed, he does not thereby bind himself by all the conditions of the former deed.(4)(b)

(1) *Treasurers v. Lang*, 2 Bai. 430; *Bailey v. Lloyd*, 5 Russ. 339; *Cholmondeley v. Clinton*, 2 B. & A. 625; *Bottrell v. Summers*, 2 Y. & J. 407; *Cole v. Patterson*, 25 Wend. 456; *Schermerhorn v. Negus*, 2 Hill, 335; *Powell v. Powell*, 5 Dana, 170; *Hancock v. Byrne*, Ib. 514; *Doe v. Porter*, 3 Pike, 18; *Farrow v. Rees*, 4 Beav. 18; *Crosby v. Chase*, 5 Shepl. 369. See *Wilkins v. Dingley*, 29 Maine, 73; *Inskeep v. Shields*, 4 Harring. 345.

(2) *Withes v. Casson*, Hob. 128; *Lewen v. Mody*, 3 Leon. 135; *Jerman v. Orchard*, Skin. 543; *Duke, &c. v. Graves*, 9 Barb. 395.

(3) *Huntington v. Havens*, 5 John. Cha.

23; Co. Lit. 352 b; *Shelley v. Wright*, Willes 9; *Bowman v. Taylor*, 2 Adol. & El. 278; (— *v. Rostron*, Ib. 295;) 1 Har. & Woll. 400; *Doe v. Fallows*, 2 Tyr. 460; *Carver v. Jackson*, 4 Pet. 83; *Mehaffy v. Dobbs*, 9 Watts, 363; *Tull v. Owen*, 4 Y. & Coll. 192; *Carpenter v. Buller*, 8 Mees. & W. 209.

(4) *Griggs v. Smith*, 7 Halst. 22. (See *Crease v. Barrett*, 5 Tyr. 458.) *Doe v. Shelton*, 3 Ad. & El. 265; *Sims v. Meacham*, 2 Bai. 101; *Carpenter v. Buller*, 8 Mees & W. 209; *Boggs v. Varner*, 6 Watts & S. 469; *Joeckel v. Easton*, 11 Mis. 118; *Goodwin v. Kensett*, 1 Smith, 126; *Wilkins v. Dingley*, 29 Maine, 73.

(a) Children are not estopped from setting up their claims to their father's property, by reason of recitals in a deed in which they had joined, or under which they claimed, that the personal estate had been bequeathed to the wife absolutely. *McKonkey's Appeal*, Harris, 253.

(b) It is said, a recital binds none except those who claim under the party making such recital. *Doe v. Errington*, 8 Scott, 210. But it is held to bind them. Thus, the defendant claimed under A, who claimed under a conveyance from a receiver in Chancery, which conveyance recited a decree, setting aside as fraudulent a deed from a former owner. Held, the defendant could not set up such fraudulent conveyance as a valid title. *Chatauque, &c. v. Risley*, 4 Denio, 480.

A declaration in the deed, that the land had been previously granted to a certain person, is not evidence, for the parties to the deed, of such grant. *Crump v. Thompson*, 9 Ired. 491.

The recitals in a deed of the marshal of a court, executed under a decree, are no evidence of his authority to convey, as against an adverse claimant. *Masters v. Varner*, 5 Gratt. 168.

Where a decree, directing the marshal to convey, was a necessary link in a chain of title; held, it was not, of itself, competent evidence of his authority to convey the land embraced in his deed, unless it designated the land directed to be conveyed; but that the whole record, or so much of it as would show what land was directed to be conveyed, must be produced with the decree. Ib.

34. A recital of one deed in another is evidence of the former, after proof of its execution and loss. So a recital of a former deed and its loss; as against the grantor and his privies.(1)

35. Where the deed recites that the land is subject to a mortgage, the covenant of warranty, &c., does not bind the grantor as against such mortgage, it seems.(2)

36. Where a deed purports to convey a *possibility*, a recital of the truth therein does not bar the grantor by estoppel, though he has received the consideration.(3)

37. A grantee is presumed to understand the title to the land, so far as it appears by the recital. But, where a recital is obviously made as a *description*, and not by way of deducing the title, it cannot be used as evidence of title.(4)

38. A general grant may be restrained by a recital, stating the object of such grant. Thus, where the recital stated that the grantee had bought a certain mill, &c., and contemplated obtaining a greater head of water than was then used, and might raise the old dam or build a new and higher one, which might flow the grantor's land; held, this recital restrained the grant, though general in its terms, to the right of building a dam at the place, and for the purpose, mentioned in the recital.(5)

39. After the recital, follows the consideration, and the receipt of it; and then the words of grant or conveyance, and the description of the property.

40. It is said, the description of the property cannot be too minute and accurate. Thus, indefiniteness in the description of land sold for taxes avoids the sale.(6) And, if the description is wrong, it will control even the acts of the grantee in taking possession of the estate.(7)

41. Thus, where a grantee is evicted from lands taken possession of under his deed, but not falling within the description in the deed, he cannot recover on the covenants of seizin, and for quiet enjoyment.(8)

42. But a very general description may be effectual to pass lands, though added to a precise description of other property. Thus, a grant of lands in the patent of B, and of all other lands in the province of New York, belonging to the grantor, passes the residue of his lands in New York. The general rule is, however, that a particular specification will exclude things not specified.(9)

43. A conveyance of "all lots I now own in the town of F," &c., is good for all that can be identified.(10)

44. Land may be described by numbers of lots, in figures—as, "lot No. 54." And, though the figures are so obscure that the plaintiff reads them as 174, and the defendant 84, yet, if the court and jury are satisfied from the whole deed that the former reading is correct, the deed is valid.(11)

45. In equity, as well as at law, the conveyance of a whole carries

(1) *Ford v. Grey*, 6 Mod. 45; *McCeskin v. Leadbetter*, 1 Kelly, 551. (See *Beall v. Lynn*, 6 Har. & J. 336; *Carroll v. Norwood*, 5, 164; *Bowman v. Taylor*, 2 Ad. & Ell. 278.)

(2) *Jackson v. Hoffman*, 9 Cow. 271.

(3) *Doe v. Scarborough*, 3 Adol. & El. 2.

(4) *Simpson v. Hawkins*, 1 Dana, 327; *Griggs v. Smith*, 7 Halst. 25; (15 Pick. 68.)

(5) *Woods v. Nashua, &c.*, 5 N. H. 467; *Norton v. Leonard*, 12 Pick. 157.

(6) *Raymond v. Longworth*, 4 McLean, 481.

(7) 4 Cruise, 221. See *Neel v. Hughes*, 10 Gill & J. 7.

(8) *Tymason v. Bates*, 14 Wend. 671.

(9) *Jackson v. Delancey*, 11 John. 365; 13, 557; *Nicoll v. Trustees, &c.*, 1 John. Cha. 166;

Moor v. Moor, Loft, 398; 2 Tyr. 178.

(10) *Starling v. Blair*, 4 Bibb, 288.

(11) *Middlebury, &c. v. Cheney*, 1 Verm. 536; *Jackson v. Ransom*, 18 John. 107.

all the parts, though some of them were not in the view of the parties.(1)

46. A deed of *all one's share and interest* passes reversionary as well as present estates. So, a deed conveying "all right, title, interest, or claim to any land descended to me from A or B," is sufficiently descriptive to pass title to any legal or equitable estate which the grantor inherited from A or B.(2)

47. In the description of real property, there are certain technical terms, appropriated by law to the several forms in which that kind of property usually exists.

48. The word *messuage* is synonymous with dwelling-house;(a) and, if granted *with the appurtenances*, includes all buildings attached to or connected with the house, the *curtilage*, garden and orchard, and the close in which the house stands. But not any greater quantity of land, though usually occupied with the house.(3)

49. The word *farm* embraces a messuage, and all the kinds of lands used therewith.(4)

50. A *homestead* is the place of the house, or home place. *Homestead farm* does not necessarily include all the parcels of land owned by the grantor, though lying and occupied together, and though a part of them are conveyed. Thus, where the deed begins and ends the description with this term, but further speaks of the land as the same conveyed to the grantor by certain specified deeds, the particular, controls the general description, and excludes all land not embraced in those deeds.(5)(b)

(1) Farnam v. Brooks, 9 Pick. 212.

(2) Sowle v. Sowle, 10 Pick. 376; Barton v. Morris, 15 Ohio, 408.

(3) Co. Lit. 5 b; Smith v. Martin, 2 Saun. 400.

(4) Co. Lit. 5 a; Touch. 93.

(5) Woodman v. Lane, 7 N. H. 241. (See Jackson v. Berringer, 15 John. 471.) Cloyes v. Sweetser, 4 Cush. 403.

(a) The conveyance of a *dwelling-house* will pass a shed and chaise-house, so connected therewith as to make one building. Hilton v. Gilman, 5 Shepl. 263. The term *messuage*, as used in the statute relating to *dower*, may include a few acres adjacent to a dwelling-house, but not a whole farm. Grimes v. Wilson, 4 Blackf. 331.

Conveyance of a dwelling-house partly finished, with an obligation to finish it. There was an erection a story and a half high, with rooms for the family. In the rear, annexed to it, was another, one story high, designed for a kitchen, and annexed to that was another unfinished erection, designed for a wash-room and other appendages. Held, the last erection was part of the dwelling-house, which the party was bound to finish. Hovey v. Luce, 31 Maine, 346.

One who had erected buildings on land, to which he neither had nor claimed title, gave a quit-claim deed of "the house and stable, on, &c., built and occupied by me." The deed contained none of the usual covenants applicable to real estate, but declared that the grantor should not claim "any right or title to the aforesaid premises, or their appurtenances, or any part or parcel thereof, forever." Held, nothing passed by such deed except the mere buildings. Derby v. Jones, 27 Maine, 357.

(b) A was the owner, and long in the occupation of a farm, to which he added a tract of wood-land. He then mortgaged to B, "my home farm, containing seventy acres, more or less," the boundaries excluding the wood-land. He afterwards assigned for benefit of creditors, "the farm whereon I live, containing seventy acres, under mortgage to B." Held, the wood-land passed by the assignment. Wheeler v. Randall, 6 Met. 529.

A granted to B, "a certain lot of land situate on my home farm in W., on the west side of the road," containing twenty acres, "the said lot to contain one acre in such shape as the said [B] may choose," and "said one acre is supposed to contain a ledge of limestone or marble." At the time of the conveyance, there was upon the twenty acres a ledge of limestone or marble, and at a distance therefrom a dwelling-house, barn, and other buildings. Held, that B had no right so to locate his acre, as to include the ledge of limestone and mar-

51. *Land* includes any species of soil, and all buildings erected thereupon.(1)

52. A grant of *the profit* of land, accompanied by livery *secundum formam chartæ*, passes the land itself, with all below and above it.(2)

53. A grant of *woods* passes the land, or an exclusive right so far as is necessary for the support of the trees.(3) (See *infra*, secs. 142-5.)

54. *Pastures* includes pasturage land of the grantor, and also his pastures and feedings in the land of others. *Meadows* passes meadow land.(4)

55. *Water* passes only the fishery. To pass the water itself, the description should be, so much land *covered with water*. But the word *pool* passes both water and land.(5) (See pp. 100-1-13.)

56. The grant of *a river* does not pass the soil, nor an island within it. But land under water passes as *land* within the bounds mentioned.(6)

57. Where one owning upon one side of a stream, and also the bed of the stream, conveys to the opposite owner the land under water to the centre, reserving the right to butt a dam on both shores, and covenanting to allow the grantee to do the same; the parties have an equal right to use the water.(7)

58. The word *tenement*, though in its popular use applied only to buildings, includes, in law, everything of a permanent nature, which may be holden, whether corporeal or incorporeal.(8) (See ch. 1.)

59. The words "and all the buildings thereon," in a deed, have no legal operation.(9)

60. The conveyance of *a yard* will not pass a cellar under it, if an intention be shown to the contrary.(10)

61. *Manure*, lying about a barn upon the land conveyed, passes as incident thereto, unless expressly reserved.(11) (See ch. 1.)

62. An easement appurtenant to land passes with the land, though the deed neither mentions the easement, nor privileges and appurtenances generally, unless it be expressly reserved by the deed, or by another made at the same time. And the rule is the same at law and in equity. But an easement which is extinct, or which has no *legal* existence, though used *de facto*, does not pass as an *appurtenance*.(12)(a)

(1) Co. Lit. 4 a.

(2) Co. Lit. 4 b; Reed v. Reed, 9 Mass. 372; Rehoboth v. Hunt, 1 Pick. 224; Worcester v. Green, 2, 425; Bowers v. Porter, 4, 203-4.

(3) Co. Lit. 4 b; Clap v. Draper, 4 Mass. 268.

(4) Co. Lit. 4 b; Jackson v. Halstead, 5 Cow. 216.

(5) Co. Lit. 4 b.

(6) Jackson v. Halstead, 5 Cow. 216; Rogers v. Jones, 1 Wend. 237; 1 Price P. C. 148.

(7) Case v. Haight, 3 Wend. 632. See Doe v. Cullum, 4 Alab. (N. S.) 576.

(8) Co. Lit. 6 a. But see Stearns, 150; Angell on W. C. 18.

(9) Crosby v. Parker, 4 Mass. 110; 7 John. 217.

(10) Doe v. Burt, 1 T. R. 701.

(11) Kittredge v. Woods, 3 N. H. 503.

(12) Plant v. James, 5 Barn. & Adol. 791; Kent v. Waite, 10 Pick. 138; Pattison v. Hull, 9 Cow. 747. See Chapman v. Gatecombe, 2 Bing. N. R. 516; 6 Conn. 289.

ble, and from thence to run a narrow strip of land to the buildings, and include within his one acre lot the land on which the buildings stood. Grover v. Drummond, 25 Maine, 185.

A deed "granted," &c., to A, "the plantation," on which she then resided, "together with the house, outhouses, and appurtenances thereto belonging," "with as much land adjoining the improved plantation," &c., as they or either of them might "have occasion to occupy for cultivation," "and as much timber for plantation purposes as might be necessary." Held, this did not convey the whole tract, wood and cultivated, of which the "improved plantation," formed a part. Hext v. Jarrell, 3 Strobb. 11.

(a) See *Easement*. (See also U. S. v. Appleton, 1 Sumn. 492.) A grant passes every

63. In general, land cannot pass as appurtenant to land. Thus the conveyance of a mill, with the appurtenances, does not pass the soil of a way immemorially used to such mill. So a highway adjoining upon land conveyed does not pass with it, unless included by reasonable construction in the deed.(1)

64. But a wharf and dock, as connected with the flats in front of them, are not regarded as land, within the meaning of this rule. And from necessity a conveyance of the former will pass the latter also.(2)

65. In Massachusetts, a grant of land bounded on marsh, which borders on flats adjoining the sea, does not pass the flats by virtue of the ordinance of 1641. The flats belong to the proprietor of the adjoining land, whether upland or marsh. But the deed of a wharf, extending from upland below high-water mark, and bounding on an arm of the sea in which the tide ebbs and flows; will pass the flats, as parcel of and appurtenant to the wharf.(3)

66. The grant of a thatch bank, covered with water at high tide, does not pass the flats or marsh between the bank and low-water mark, or the channel of the river upon which it lies.(4)(a)

67. A fence standing upon the land conveyed, or intended and maintained as a division fence, though varying from the true line, passes as appurtenant, unless expressly reserved.(5)

67 a. Wood and timber, cut down prior to the sale of land, does not pass to the purchaser of the land, but is severed from the inheritance, and becomes personal property.(6)

68. The construction of conveyances of mill rights has been considered at length, in treating of water-courses and mills. One or two additional cases only will be here referred to.(b)

(1) Doane v. Broad Street, &c., 6 Mass. 332; Leonard v. White, 7, 6; Jackson v. Hathaway, 15 John. 447; Jackson v. Striker, 1 John. Cas. 284; Cole v. Haynes, 22 Verm. 588. But see Ashm. 417; U. S. v. Harris, 1 Sumn. 37-8, that it is otherwise if the intention so require. See also Leavitt v. Towle, 8 N. H. 96.

(2) Ib.

(3) Rust v. Boston, &c., 6 Pick. 158; Ashby v. Eastern, &c., 5 Met. 363.

(4) Lufkin v. Haskell, 3 Pick. 356.

(5) Ropps v. Barker, 4 Pick. 239.

(6) Crouch v. Smith, 1 Maryland Ch. Decis. 401.

thing necessary to its enjoyment. Coheco, &c. v. Whittier, 10 N. H. 305. A clause in a deed, conveying land "with all the buildings, ways, privileges, and appurtenances, to the same belonging," conveys an easement or appurtenance already existing and belonging to the land, but cannot create a new one. Kenyon v. Nichols, 1 Rhode Island, 411.

(a) It has been stated in a former chapter, that a deed bounding upon a river not navigable, passes a title to the centre of the stream. In a late case in Maine, this doctrine has been held inapplicable to a natural pond, upon the ground that it could not with any propriety be applied to very large ponds, and that there can be no definite line drawn between large and small ones. Bradley v. Rice, 1 Shepl. 198. (See Hathorne v. Stinson, 1 Fairf. 233; Waterman v. Johnson, 13 Pick. 261.) And parol evidence is not admissible, to control this construction. Lowell v. Robinson, 4 Shepl. 357; *infra*, sec. 130 and sequ. Conveyance, from the road north, to the margin of the cove, thence west, along the margin, &c., about eleven rods, thence south to the road. Held, no flats passed by the deed, but the edge was the boundary. Nickerson v. Crawford, 4 Shepl. 245.

(b) The grant of a "mill-site" conveys a water power, together with the right to maintain a dam, wherever suitable for the convenient and beneficial appropriation of the water power. Stackpole v. Curtis, 32 Maine, 383. It also passes the land covered by the mill, necessary for its use, or ordinarily used with it. Crosby v. Bradbury, 2 Apple. 61. So the term mill or mill-privilege. Gibson v. Brockaway, 8 N. H. 465; Maddox v. Goddard, 3 Shepl. 218; Moore v. Fletcher, 4, 63. Where the owner of land, upon a stream connecting two ponds, leases to another "so much land adjoining said stream of water as shall be necessary and

69. Where one conveys land, having a mill upon it, with the appurtenances, and he holds a leasehold water right, the latter passes.(1)

70. The grant of a water privilege passes as appurtenant thereto the right of flowing adjoining lands of the grantor, so far as is necessary for profitably using such privilege, as it was used at and before the time of grant. But, in case of a grant by the State of land to A, with a mill-site thereupon, and afterwards of other lands to B, A has no right to flow the land of B, though B's grant is subsequent to the erection of a dam by A, and the letters patent to B refer to a map on which the land is represented as flowed.(2)

71. *Damages*, to be recovered for a trespass upon land, do not pass by a conveyance of the land. So the conveyance of a party-wall does not entitle the grantee to contribution from an adjoining owner, as against a payment to the first builder, though the purchaser had no notice of it. So a claim to compensation, under an act for adjusting certain titles, does not pass by a conveyance of the land. So, where one conveys land in fee, reserving merely a right to a part of the purchase-money charged thereupon, and afterwards makes another deed of all his right and title to the land; the latter deed does not pass his interest in the money charged. But where a testator devised one fourth of his land to his son, and, for the more easy distribution of his estate, directed all his real estate to be sold by his executor; held, a deed by the son, of his interest in the land, passed his interest in the proceeds when the land was sold.(3)

72. When property in land passes by a deed, the property in the deed passes with it. In England, a conveyance in fee-simple usually contains a clause granting all deeds, evidences, writings, &c. This is said to be advisable, though not absolutely necessary, because the deeds pass as incident to the land, by a deed without warranty. But, in conveyances to use, the clause is highly important, it being otherwise left doubtful whether the trustee or *cestui* shall have the deeds. A purchaser without warranty, and without any express grant of deeds, &c., is not entitled to prior warranty deeds upon which the grantor might have his warranty paramount.(4)(a)

73. Upon the maxim, "*id certum est, quod certum reddi potest*,"(b)

(1) Provost v. Calder, 2 Wend. 517; Pickering v. Stapler, 5 S. & R. 107; Strickler v. Todd, 10, 63. (See Marshall v. Niles, 8 Conn. 369; Taylor v. Hampton, 4 McCord, 100)

(2) Oakley v. Stanley, 5 Wend. 523; Colvin v. Burnet, 2 Hill, 620.

(3) Schuyllkill, &c. v. Decker, 2 Watts, 344;

Hart v. Kucher, 5 S. & R. 1; Comm. v. Sheppard, 3 Penns. 509; Craft v. Webster, 4 Rawle, 242; Costen's, &c., 1 Harris, 292.

(4) Lord v. Wardle, 3 Bing. N. R. 680; Ld. Buckhurst's case, 1 Rep. 1 a. See Dryden v. Frost, 3 My. & C. 670.

convenient for him to use and occupy for the purpose of making and using a canal to slip lumber from one pond to the other, and for no other purpose," the deed does not convey by implication the right to erect a dam, and flow the lands of the grantor, in order to obtain a supply of water for the canal. Davis v. Brigham, 29 Maine, 391.

(a) After the expiration of a lease, containing covenants by the lessor, he cannot claim the lease from the lessee, as his property. Hall v. Ball, 3 Mann. & G. 242. See Farrow v. Rees, 4 Beav. 18.

(b) But, where this maxim is not complied with, uncertainty avoids the conveyance. Conveyance of 412 acres of a tract containing 1,020 acres. Held invalid. Swayze v. Doe. 13 Sm. & M. 317.

G H having died, leaving both real and personal estate, and one son, C H, his sole heir, R R was duly appointed his administrator. C H executed and delivered to R R an instrument under seal, but not acknowledged or recorded, in the terms following: "Know all

a conveyance of *all the grantor's lands in a certain county*, or the lands descended from, or occupied by A, will be effectual to pass all the grantor's estate included in this description. So a conveyance of land in A, being a part of the real estate of B deceased, and set off as dower to the widow C, as it may be made certain by reference to the probate records, passes the land described. And a reference to another deed may even control courses and distances.(1)

74. If a grantor is in possession, his deeds will pass all the title which he has, though referring to another deed, which is on record and void.(2)(a)

75. A deed may also be made sufficiently certain by a reference to the actual condition of the property conveyed.(3)

76. Where one conveys "all that part of my land, &c., which I purchased of A by deed dated, &c., recorded, &c.," and covenants against all incumbrances, he is liable upon such covenant on account of a right of way reserved in the deed from A. The reference to A's deed is made merely to identify the land, and not to limit or qualify the estate granted.(4)

77. Where a description, though at first uncertain, is afterwards made certain, the deed is valid.

78. Conveyance of 600 acres, to be surveyed or taken off from a large tract. By a writing referred to in the deed, it appeared that the tract was parcelled into tracts of 100 acres, from which the grantee was to select, which he afterwards did. Held, a title to the portions selected passed by the deed.(5)

79. And even parol evidence has been received to aid the certainty of a reference. Thus, where a deed referred for a description of the land to another deed, which conveyed a right to lay out a certain number of acres in common and undivided lands, parol evidence was received, to show that a lot laid out was the same which was meant to be conveyed. So also, A and B being tenants in common of a tract of land of 47 acres and 28 rods, A conveyed to B a part thereof, bounding it in the deed "north on land this day deeded to A by B." On the same day, B conveyed the other part to A, bounded "south on land this day deeded to B by A, to contain 24 acres, more or less." Held, the deeds were not void for uncertainty; but the deed from B did not convey any precise quantity of land; but that there was a latent

(1) *Att'y, &c. v. Downshire*, 5 Price, 269; *Izard v. Montgomery*, 1 Nott & M'C. 381; *Touch*, 250; *Stearns v. Rice*, 14 Pick. 411; *Cutler v. Tufts*, 3 Pick. 273; *M'Chesney v. Wainright*, 5 Ohio, 453; *Allen v. Bates*, 6 Pick. 460, 2 Gill & J. 429; *Ritter v. Barrett*, 4 Dev. & B. 133. See *Jenks v. Ward*, 4 Met. 404; *Maack v. Sinclair*, 10 Verm. 103; *Gilman v. Thompson*, 11, 643; *Thatcher v. How-*

land, 2 Met. 41; *Everitt v. Thomas*, 1 Ired. 252; *Whitman v. Whitman*, 7 Met. 268; *Marr v. Hobson*, 9 Shepl. 321; *Tyrrell v. Comstock*, 18 Conn. 210.

(2) *Hall v. Leonard*, 1 Pick. 27.

(3) *Grant v. Chase*, 17 Mass. 443.

(4) *Harlow v. Thomas*, 15 Pick. 66. (See *Griggs v. Smith*, 7 Halst. 25.)

(5) *Corbin v. Jackson*, 14 Wend. 619.

men, &c., that I, C H, of, &c., in consideration, &c., paid me by R R, &c., do by these presents release and forever quit-claim unto the said R all my right, claim or title whatever in and unto said estate, and that I will defend said R, against all persons claiming by or under me." It was held, that R R acquired no title thereby to any of the real estate of G H *Hunting v. Russell*, 2 Cush. 145.

(a) Conveyance, referring to a particular occupation of the whole of a certain tract, and also to another deed, which included but a part. Held, the whole passed. *Melvin v. Proprs., &c.*, 5 Met. 15; acc. *Crosby v. Bradbury*, 2 Apple. 61.

ambiguity as to the boundary between A and B, which might be explained by parol evidence.(1)

79 *a*. A corner was described as on the *east* side of a creek, but there was evidence tending to show that it was on the west side. Held, it was a question for the jury, on which side the corner was located.(2) So, the plaintiff claimed under a deed from one A to his ancestor, dated January, 1811, which conveyed a certain lot "except 50 acres by measure off the south-west end of said lot." The plaintiff produced a deed dated July, 1810, from A to B, of said 50 acres, stating generally how the dividing line was to run. The defendant offered a deed, duly executed and acknowledged, but not recorded, from B to the defendant's ancestor, dated November, 1811. Held, the latter deed, though unrecorded, was admissible to prove the defendant's title to the 50 acres, excepted in the deed from A to the plaintiff's ancestor.(3)

80. But, where a deed from A to B bounds the land by that of other persons, reference being had to *their deeds*; in an action by B for breach of covenants, parol evidence is not admissible in connection with the deed of A's grantor to him, to explain A's deed to B; because the latter deed refers not to the deed to A, but to the deeds made to adjoining owners.(4)

80 *a*. The line of an adjoining tract was named as a boundary. Held, evidence was inadmissible, that a different line was intended, though the grantee so declared, and the grantor occupied up to it.(5)

80 *b*. Deed of land, describing it by metes and bounds, and as bounded on one side by a street, and also as "the same that was set off to W." The land set off did not extend to the street, and the grantor was not seized of any land besides that which had been so set off. Held, the land included by the metes and bounds passed.(6)

81. A conveys to B "three parcels or lots of land, situated in P., the first parcel bounded," &c., "being the same which was conveyed to me by C, by deed, dated April 9, 1807, now on record." By deed of this date, C had conveyed to A three tracts in P. Held, all of them passed to B, and not the one alone which was particularly described.(7)

82. A owned a farm, one undivided third of which had been conveyed to him by B, May 14, 1811, the other two-thirds, March 26, 1813. November 27, 1821, A conveyed to C certain parcels of land, "also one other parcel, &c., particularly described and mentioned in a deed from B to me, dated May 14, 1811, said parcels being all the farm on which I now live." Held, the deed of May 14, 1811, was referred to, for the purpose of describing *the land*, and not *the quantity of estate* meant to be conveyed, and that the words *all the farm* passed the whole of the land.(8)

83. Conveyance of "a certain tract of land or farm, lying in W, &c., which was granted by the proprietors, &c., to E P—bounded as follows," &c. The boundaries excluded a small piece of land, which was included in the farm. Held, the reference to the former grant controlled the courses, &c., and the piece in question passed.(9)

(1) *Allen v. Bates*, 6 Pick. 460; *Crafts v. Hibbard*, 4 Met. 438.

(2) *Hauser v. Belton*, 10 Ired. 358.

(3) *Hackett v. Sawyer*, 14 N. H. 65.

(4) *Hubbard v. Norton*, 10 Conn. 422.

(5) *Johnson v. Farlow*, 11 Ired. 199.

(6) *Dana v. Middlesex Bank*, 10 Met. 250.

(7) *Child v. Fickett*, 4 Greenl. 471.

(8) *Willard v. Moulton*, 4 Greenl. 14. See *Vose v. Bradstreet*, 27 Maine, 156.

(9) *Keith v. Reynolds*, 3 Greenl. 393.

84. It is a maxim, "*veritas nominis tollit errorem demonstrationis.*" So also, "*falso demonstratio non nocet.*"(1) Another certainty, put to a thing which was certain enough before, is of no effect.(2) Thus, where there is a general description of the land, which is correct, as *the manor of A*, or *parcel of the manor of A*; or where the abutments are given correctly, or the general boundaries, the grantor having no other lands in the county; such description is not affected by any subsequent error of addition, more especially if obviously inconsistent with the intention of the parties.(3) Thus, where there is a grant of a close called A, in the parish of B, in the county of C, and B extends partly into the county of D, and the close is wholly in D; the close A still passes, notwithstanding the subsequent misdescription.(4) So a lease of all that the farm of A, in the tenure and occupation of B, passes the farm, though not thus occupied. So reference to a *plan* controls a subsequent erroneous designation of the quantity meant to be conveyed.(5)

85. Lease of all that part of the park called B, in the county of D, and now occupied by S, lying within certain bounds, with all houses, &c., belonging thereto, and which are now in the occupation of S. Held, a house within the bounds, but not occupied by S, passed by the deed.(6)

86. Where there is a grant of a particular thing, once sufficiently ascertained, the addition of an allegation, mistaken or false, will not frustrate the grant; but, where a grant is in general terms, the addition of a particular circumstance will operate by way of restriction.(7)(a)

87. If the words, "with the dwelling-house thereon," are inserted in a deed, when in fact there is none, the error does not control the rest of the description, or defeat the grant.(8)

88. On the other hand, where the principal description is wrong, or, as Lord Bacon says, that which *sounds in denomination* is false, which is *the more worthy*; the conveyance is void, though the secondary description is correct, or that which *sounds in addition* is true. Thus, if one grant his tenement, or all his tenements, in the parish of A *without B*, when in fact it is *without C*, the land does not pass, though to this description is prefixed or added the clause, *in the tenure of D*, which is true.(9)

(1) Bac. Tra. 102; Llewellyn v. Jersey, 11 Mees. & W. 183; Bosworth v. Sturtevant, 2 Cush. 392. See Trustees v. Peaslee, 15 N. H. 317; Job v. Tebbetts, 4 Gilm. 143.

(2) Wrotesley v. Adams, Plow. 191.

(3) Bac. Tra. 102; Cutler v. Tufts, 3 Pick. 272; Hibbard v. Hurlburt, 10 Verm. 170; Chaplin v. Srodes, 7 Watts, 410; Thatcher v. Howland, 2 Met. 41; Mayo v. Blount, 1 Ired. 283.

(4) Ib. 105; Windham v. Windham, Dyer, 376.

(5) Wrotesley v. Adams, Plow. 191; Llewellyn v. Jersey, 11 Mees. & W. 183; Vose

v. Bradstreet, 27 Maine, 156.

(6) Doe v. Galloway, 2 Barn. & Adol. 43; 2 Nev. & M. 240.

(7) Munro v. Alaïre, 2 Caines, 320; Conolly v. Vernon, 5 E. 51; (Goodtitle v. Southern, 1 M. & S. 299; Drinkwater v. Sawyer, 7 Greenl. 366;) Doe v. Porter, 3 Pike, 184.

(8) Rogers v. Clark, 7 John. 217; Crosby v. Parker, 4 Mass. 110.

(9) Bac. Tra. 105; Dowtie's case, 3 Rep. 9; Stukeley v. Butler, Hob. 171.

(a) Conveyance of a lot in an extensive tract of woodland, described as "running south by T's farm, so far as to include 150 acres." The other boundaries, which were clearly proved, and the whole description of the granted premises, manifestly showed that the southern boundary was defectively described as "T's farm." Held, the jury were at liberty to extend the line of the land conveyed beyond the southerly line of T's farm. Slater v. Rawson, 1 Met. 450.

89. Whether erroneous words of addition may operate to *restrain* a correct principal description preceding them, depends on a minute distinction of phraseology. Where the whole description constitutes one sentence, of which the former part is an imperfect clause, this may be restricted by the latter. But where each part is a complete sentence by itself, the latter is not a *restriction*, but an *explanation* of the former.(1)

90. A corporation demised "all that their glebe land lying in C, viz., seventy-eight acres of land, and also all the demesnes of the said seventy-eight acres, with all the tithes of said parish, and also the tithes of said seventy-eight acres; *all which* lately were in the occupation of A, deceased." In fact, the tithes of the lands demised were never in A's occupation. Held, inasmuch as there were three distinct clauses preceding the last, viz., the grant of the seventy-eight acres of glebe, the grant of the tithes, and the grant of the tithes of the seventy-eight acres; the subsequent error of description did not exclude from the grant the tithes which were never in A's possession.(2)(a)

91. A particular description may restrain or enlarge a preceding general one. Thus, a grant of all one's lands in A, which he has by the gift of B, passes only such lands as came from B. But a grant of all one's lands in A, *called N, which was the estate of B*, passes the land called N, though it was never B's. General words are not restrained by restrictive words added "*ex majori cautela*," or by affirmative words more restrictive, but which do not tend to render a general description ambiguous or uncertain.(3)

92. The above principles have been thus expressed by the court in Massachusetts. It is the general rule, that when a description includes several particulars, all of which are necessary to identify the property, no estate will pass, which does not conform to every particular. Thus, if one grant all his estate *in his own occupation in the town of A*, no estate passes except what is in that town, and also occupied by him.(b) But, to effect the intention, where the estate referred to can be identified, it will pass, though not conforming to some points of the description. Thus, if a person, owning but one house in A, convey *his house in A, which was formerly B's*, when in fact it was formerly C's and not B's, the house will pass. So, where land is correctly described, as *the grant-*

(1) 5 E. 51.

(2) *Swyft v. Eyres*, Cro. Car. 546.

(3) *Tenney v. Beard*, 5 N. H. 58; Bro. Abr.

Grants, 92; 4 Cruise, 226; *Stukeley v. Butler*, Wms. Hob. 310, n. 2.

(a) Conveyance of all the grantor's farm in S, bounded, &c., also six acres of woodland described by bounds—"being the same farm whereof A died seized, and which the heirs of A conveyed to me by two deeds recorded," &c. The woodland was never in fact owned by A, nor conveyed by his heirs, as stated. Held, it still passed by the deed. *Winn v. Cabot*, 18 Pick. 553.

(b) Conveyance of "all the land lately owned by P D, deceased, now occupied by T S P." Land occupied by T S P, but not owned by P D, does not pass. *Marshall v. Pierce*, 12 N. H. 128.

A deed described the land as bounded on the west by the highway, leading from A's, to the Erie canal, east by land occupied by B, and south by land owned by D. The premises in dispute were once owned by D, but were not bounded on the south by any lands that were, or ever had been owned by him. But directly north of and adjoining the premises in dispute, was another parcel of land, answering the description in the deed in every respect, and in which the debtor had at the time an interest in right of his wife. Held, the deed did not embrace the premises in dispute; but did include the parcel lying on the north; that if the latter parcel was not included in the deed, then the deed was void for uncertainty; that every part of the description must be read, and satisfied with reasonable certainty, and no part of it could be rejected for its falsity. *Mason v. White*, 11 Barb. 173.

's farm, on which he then lived, with his house, &c., thereon, and the quantity of land and the boundaries are also correctly given for such farm; the farm passes by the deed, although the additional description of lot 17, is erroneously given to it. It is said, the lot is descriptive of the farm, not the farm of the lot; and rather than hold the deed void, must be the case if the number were to control, both the farm and lot 17 also should be held to pass.(1)(a)

93. It is a general rule in the lines of description in a deed, that what is most material and certain, and therefore apparently most conformable to the parties' intention, shall control that which is less so. Dictory yield to locative calls. This rule applies not only to fixed objects or calls, as compared with course and distance, but also as between different objects or calls themselves. Those which are most prominent, certain and permanent, will govern.(2)

94. Fixed, known, and unquestionable monuments, or marked lines and corners, (more especially where the vendor points out the land and mentions as boundaries,—such as a river or known stream, a ring or marked tree—control courses and distances and computed quantities. Both the last-named measures are subject to inaccuracy and various computation; but monuments are fixed, and subject to no uncertainty. But, where the monuments cannot be ascertained, the length of the lines or the general description governs, and, in general, the lines will control the quantity.(3)(b)

(1) Worthington v. Hylyer, 4 Mass. 205; Pike, 18; Jackson v. Clark, 7 John. 217; Wyun v. Thomas, 2 Gill & J. 429; Bozoun's case, 4 Co. 34; Goodtitle v. Paul, 2 Burr. 93; Hull v. Fuller, 7 Verm. 100; Moo. 45; man v. Loomis, 5 N. H. 408; Ela v. Card, 175; Wing v. Burgis, 1 Shepl. 111; Wakefield v. Ross, 5 Mas. 16; Howell v. Soule, 410; Whiting v. Dewey, 15 Pick. 428; Wes v. Prentice, 16 Pick. 345; Mason v. Hite, 11 Barb. 173; Foy v. Neal, 2 Strobb. 6.

(2) Thomas v. Godfrey, 3 Gill & J. 142; Hite v. Gay, 9 N. H. 126; Bratton v. Clawson, 3 Strobb. 127; Bell v. Hackman, 6 Amph. 398; Fana v. Manning, 11, 311; very v. Hueton, 2 Greene, 344; Lincoln v. Elder, 29 Maine, 169. See Rich v. Ellett, 10 Verm. 211; Allen v. Allen, 2 Shepl. 7.

(3) Thomas v. Godfrey, 3 Gill & J. 142; Jackson v. Camp, 1 Cow. 605; Cate v. Thayer, 3 Greenl. 71; Pernam v. Wead, 6 Mass. 131; Gerrish v. Bearce, 11, 193; Davis v. Rainsford, 17, 207; Rust v. Boston, &c., 6 Pick. 158; Cudney v. Early, 4 Paige, 209; Smith v. Dodge, 2 N. H. 303; Call v. Barker, 3 Fairf. 320; Bruce v. Morgan, 1 B. Monr. 26; Doe v. Porter, 3 Pike, 18; Hunt v. Devling, 8 Watts, 403; Robinson v. Moore, 4 McL. 279; Heath v. Armstrong, 12 Penn. 176; Nichols v. Turney, 15 Conn. 101; Frost v. Spaulding, 19 Pick. 445; King v. King, 4 Dev. & B. 164; Hough v. Dumas, Ib. 328; Becton v. Chesnut, Ib. 335; Bowman v. Farmer, 8 N. H. 402; Proprs. &c. v. Doe, 11 N. H. 520; Breck v. Young, Ib. 485; Bosworth v. Sturtevant, 2 Cush. 392; Arnick v. Hotman, 3 Strobb. 122; Robinson v. Moore, 4 McL. 279; Kruse v. Scripps, 11 Illin. 98.

(a) The construction of a deed in reference to boundary is a question of law; but it is for the jury to determine what object is referred to, and where situated. Becton v. Chesnut, 4 v. & B. 335. See ch. 83, sec. 43, and n.; Cain v. Hodge, 3 Strobb. 115.

(b) Land conveyed was described as bounded by another lot, the line of which was not own, but the deed also referred to a plan, as containing a particular description of the same land. This description was clear. referred to monuments, courses and distances, which might be settled with entire certainty, but was inconsistent with the boundary line never named. Held, the particular description should control the general one, and the reference to such boundary line be rejected. Magoun v. Lapham, 21 Pick. 135.

The "locative calls" of a survey will control the description of a map, courses, distances, Van Wyck v. Wright, 18 Wend. 157. Though a deed contain this description: "200 acres, strict measure, and no more;" all the land will pass which is contained within the monuments, courses, &c., referred to. Jackson v. McConnell, 19 Wend. 175. Even where land called for only 14,900 acres, but the bounds included 136,000 acres; the whole was held to pass. Sturgeon v. Floyd, 3 Rich. 80. Where several monuments are mentioned,

95. An ascertained place of beginning, or an ascertained line, though without any visible boundary, is to have the same controlling effect regard to measurement.(1)

96. A *clearing* is a permanent object, which will control *distance* as boundary.(2)

97. Conveyance of "lot No. 10," bounding it on all sides by land of other persons than the grantor, but wrongly describing the adjoining owners. The grantor's land lay partly in No. 10, and partly in No. Held, the whole tract passed.(3)

98. But, where the whole description renders it more probable that

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| <p>(1) <i>Bates v. Tymason</i>, 13 Wend. 300; <i>Flagg v. Thurston</i>, 13 Pick. 145; <i>Rockwell v. Adams</i>, 6 Wend. 467; <i>McAdoo v. Sublett</i>,</p> | <p>1. <i>Humph. 105</i>; <i>Mills v. Buchanan</i>, 2 Carr. 5; <i>Hale v. Darter</i>, 10 Humph. 92.
 (2) <i>Jackson v. Widger</i>, 7 Cow. 723.
 (3) <i>Tenny v. Beard</i>, 5 N. H. 58.</p> |
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the first of which cannot be found; it may be come at by proceeding the specified distance from the others towards the point where it stood. *Seidensparger v. Spear*, 5 Shepl. 12; *Otis v. Moulton*, 2 Appl. 205; *Heaton v. Hodges*, 2 Shepl. 66. See *Alden v. Noonan*, Maine, 113; *Talbot v. Copeland*, Ib. 251.

Monuments at the extremes of a line have no more effect than section corners along the line. All original monuments, established in connection with the field notes and plan must be referred to in settling the line. *McClintock v. Rogers*, 11 Illin. 279.

In determining boundaries, if any of the abutments or calls are found, they cannot be disregarded, although the others may not be found. Those which are found, if not inconsistent with each other, are elements in the rights of the parties, and cannot be departed from, substitute the subordinate description by courses and distances. *Talbot v. Copeland*, Maine, 251.

The north line of A's land was one hundred rods and six inches north from the put road. A levy was made of land, described as beginning at a tree eighty-five and a half rods north from the road, and lying north of A's land, and extending from said tree north seventy-two and a half rods; thence east fourteen rods; thence south seventy-two and a half rods to the north-east corner of A's land; thence west, along his north line to said tree. The tree could not be found. Held, the south line was at A's north line. *Alden v. Noonan*, Maine, 113.

Where a line is described, as running from a known bound a specified number of rods a stake, in the absence of all satisfactory proof of the position of that stake, the extent of the line is to be ascertained, by measuring from the boundary the number of rods named. *Liebold v. Edgecomb*, 28 Maine, 275.

Where a corner tree could not be found at the end of the declared distance, but a stump was found at a point 39 poles less than the declared distance, which had been recognized by the grantors of both parties as the corner more than 50 years before; held, it was proper to leave to the jury to find, whether the monuments or the measurements should govern. *Lebour v. Rives*, 10 Ired. 256.

Quantity, though the least reliable, and the last to be resorted to of all the descriptions in a deed, may sometimes be considered in corroboration of other proof. *McClintock v. Rogers*, 11 Illin. 279.

Description by metes and bounds, "the same containing about five and three-fourth acres, be the same more or less." Held, these words were a part of the description, and not conclusive evidence, that the grantee had taken and agreed to pay for the land, with reference to the quantity. *White v. Miller*, 22 Verm. 380.

Agreement to convey 173 acres bounding on Beach Fork, on payment of the purchase money. The lot contained 166 one-half acres, but there were two islands adjoining the lot of which the seller was in possession, containing 9 acres. Held, as the bond bounded the land on Beach Fork upon only one side, and the islands were in possession of the seller as regarded by him as part of his home estate, they passed by the deed, and the purchaser must pay the same price per acre for the surplus over 173 acres, which was agreed on for the remainder. *Thompson v. Robertson*, 9 B. Mon 383.

Devise of "a lot of about one acre of land, be it more or less, adjoining land of B & lands of W." The lot contained nearly ten acres. Held, the devisee took the whole. *Bear v. Bear*, 1 Harr. 529.

Where land was described as bounded by adjoining lots and by a street, and the quantity of ground within these bounds exceeded by twelve feet the measurement contained in

the monuments referred to were mistaken, than the distances, the latter will control.(1) And, where the land conveyed is of such nature—as for instance an *island*—that it has certain natural boundaries which cannot be mistaken, and is conveyed by its general term of description—as “all that tract or upper island,” &c.; this description controls course and distance.(2)

98 *a*. So, where course and distance only are given, parol evidence is not admissible to show a different line, by marked trees, to be the true one.(3)

98 *b*. So, lines marked on the ground constitute the actual survey, and control the return of the surveyor, even where a natural or other fixed boundary is called for by the survey; though the space between the two is but twelve perches in breadth.(4)

99. Upon the same principle, the designation of land conveyed as a single, entire estate, occupied by a person named, together with general boundaries, will control the quantity of land mentioned, though varying very greatly from such quantity.

100. Lease of “*the farm on which A now lives, lying east of the farm of B, west of that of C, south of that of D, to contain 80 acres in one piece.*” A’s farm contained 149 acres. Held, the whole passed.(5)(*a*)

100 *a*. Where the attorney-general’s deed, of premises sold under a mortgage, described the premises as the “remainder” of a specified lot, being 49 1-2 rods wide, and containing 62 1-2 acres; and such remainder contained only 36 acres, and the attorney-general had in fact advertised the remainder only, without any particular description; held, the deed only professed to convey the remainder.(6)

101. But where one conveyed two townships, described as No. 3 and No. 4, “to be six miles square, and containing 23,040 acres and no more;” and it was proved that Nos. 3 and 4 were each eight miles long and six miles wide, and contained together 67,438 acres; held, it was his evident intention that the tracts should be resurveyed, and the grantee took only the quantity named in the deed, with the right of locating a square in any part of the land at his election.(7)

102. So, where a deed, after bounding by feet and inches, added, “or however otherwise the same is bounded or reputed to be bounded, being the mansion-house and land thereto belonging;” held, the latter clause could not control the bounds specified.(8)(*b*)

103. Long continued occupation under a grant may control courses

(1) *Davis v. Rainsford*, 17 Mass. 207.

(2) *Lodge v. Lee*, 6 Cranch. 237. See *Page v. Scheibel*, 11 Mis. 167.

(3) *Wyme v. Alexander*, 7 Iredell, 237.

(4) *Walker v. Smith*, 2 Barr, 43; *Hall v. Banner*, 4 Barr. 244.

(5) *Jackson v. Barringer*, 15 John. 471;

Zeigler v. Hartz, 1 Watts & S. 533; *Clark v. Munyan*, 22 Pick. 410.

(6) *Cox v. Clift*, 2 Comst. 118.

(7) *Moore v. Jackson*. 4 Wend. 58.

(8) *Tyler v. Hammond*, 11 Pick. 193.

(*a*) A deed, after particularly describing certain parcels of real estate, closed with the clause, “all my real estate in the county of C;” some of which was not previously mentioned. Held, the whole passed. *Marr v. Hobson*, 9 Shepl. 321. Description by definite boundaries, being “the land on which (a person named) resides.” The latter clause may be rejected as incidental. *Bratton v. Clawson*, 3 Strobb. 127.

(*b*) The distinction upon this point is said to be, that if the particular recital is used for restriction, it will control the general description. Otherwise, if used for reiteration or affirmation. 9 Shepl. 350. Conveyance of “my homestead farm, being lot No. 13 in Range 4,” held, though the grantor occupied other adjoining land, only lot 13 passed. *Allen v. Allen*, Shepl. 387.

and distances, where no monuments are referred to, or where those referred to are gone.(1)

104. So, where a lot is described by number and also by metes and bounds, and the grantee takes possession of a lot conforming to the former description, but not to the latter, and continues such possession thirty-six years; the description by number shall control that by course and distance, the circumstances showing a mistake in the latter.(2)(a)

105. Conveyance of several lots, lying in a tract of wild land, called "the Boston Purchase." Among them were two thus described; "lying lots numbered 15 and 43, containing 140 acres each, more or less which were originally alluded to in the surveys of the B. P., but have been ascertained before the date of the deed to be adjoining there." Held, the two lots passed by the deed.(3)

106. In Maryland, where the proprietor of two tracts conveys the younger tract by metes and bounds, all the lands contained within the metes and bounds pass to the grantee, though part of the elder tract embraced within them.(4)

107. Even a monument erected after the making of the deed, but with the intent to conform thereto, will control the line mentioned in such deed.(5)

107 a. Lines were run by the grantees under two deeds of adjoining tracts, made at the same time, on which lines, with the intent of conforming to the location, they soon after established monuments, and continued to occupy accordingly, for more than 20 years. Held, such location controlled the distances in the deeds.(6)

107 b. Also, that evidence was admissible, that the location was made conformably to an established custom and usage, existing at the time of giving a particular measure, in locating the territory in question.(7)

107 c. So, wild lands are bounded by such lines as have been run, by proper authority, at the time of purchase, if any; and if none, by those which are afterwards so run.(8)

108. Where a deed refers to a map or plan, its lines, courses, &c., are to be regarded as expressly mentioned in the deed, whether actually annexed or not; according to the maxim, "*verba illata inesse videntur*."(b) It has been doubted whether maps can be offered in evidence

(1) Owen v. Bartholomew, 8 Pick. 520; Cutts v. King, 5 Greenl. 482.

(2) Lush v. Druse, 4 Wend. 313; Buchanan v. Stewart, 3 Har. & J. 329.

(3) Smith v. Strong, 14 Pick. 128.

(4) Mundell v. Perry, 2 Gill & J. 206; Hawkins v. Hanson, 1 Har. & M'Hen. 523; Hall v. Gittings, 2 Har. & J. 119.

(5) Makepeace v. Bancroft, 12 Mass. 469; Davis v. Rainsford, 17, 207; Lerner v. Morrill, 2 N. H. 197; Waterman v. Johnson, 11 Pick. 261. (See 9, 520.) Ken. Purchase v. Tiffany, 1 Greenl. 219.

(6) Mosher v. Berry, 30 Maine, 83.

(7) Ib.

(8) Buel's, &c. v. Tuley, 4 McLean, 268.

(a) In a contract for the sale, at a gross price, of a certain number of acres, off the western end of the vendor's tract, to come to a road, thence, in the direction of a certain fence, to a specified point, the vendee will be entitled to the number of acres named, though not included between the west end of the tract, the road, and the line run thence to a point. And the same construction will be given towards a subsequent contractor, for the residue of the tract after the first vendee's purchase shall be surveyed. Harper v. Lindsey, 1 Meigs, 310.

(b) But the reference to a plat must be certain, so that, upon its production, it will appear to be the plat referred to. But a plat cannot be referred to, in order to enlarge or diminish the effect of the words of conveyance. Kenyon v. Nichols, 1 R. I. 411.

Where a deed conveyed a lot of land, "containing a certain number of acres, more or less," bounded partly by lot numbered 53, partly by A's lot, and partly by the shores of a river

without being recorded. References to a map may pass certain premises, though from its small size they cannot be discerned thereon.(1)

109. Where land is surveyed, monuments are marked or erected, and a plan is afterwards made, to delineate the survey; if the survey and plan vary, the former governs. Otherwise, where the plan precedes the survey.(2)

110. Where there are no monuments, and the courses and distances vary, the one or the other shall control, according to the intention and the facts of the case.(3)(a)

111. In a question of boundary, where other land is referred to, the law will regard only the legal title to such land, not any merely equitable interest.

112. Land conveyed by A, was described as bounded on the land of B. B owned a lot conveyed to him by the grantor of A, and occupied as his own another, for which he had contracted and paid, but had taken no deed. Held, the former lot was the true boundary; as the grantor of A must so have viewed it, and as this lot was the only one to which the records showed that B had a title.(4)

112 a. Where a deed bounds the premises on one side by lands mentioned as owned by another person, (speaking in the present tense,) when in fact, at the date of the deed, there is no land owned by such person in that place, the land recently owned by him will be intended, and the deed shall receive this construction *ut res magis valeat quam pereat*.(5)

112 b. Conveyance "beginning at" and "bounding on" land of A. Held, the boundary was the true line of B's land, not the line of his actual occupation as shown by a fence, set up and maintained by B, before and after the conveyance, with the consent of the owner of the lot granted, supposing this to be the true line.(6)

113. A deed described a boundary line as running up a river to certain falls, "thence continuing to run in such a direction as to include a mill-yard and the whole of a mill-pond, which may be raised by a

(1) *Davis v. Rainsford*, 17 Mass. 207; *Lunt v. Holland*, 14, 149; *Thomas v. Patten*, 1 Shepl. 329; *Blaney v. Rice*, 20 Pick. 62; *Harris v. Maxwell*, 4 Dev. & B. 242; *Doe v. Cullum*, 4 Alab. (N. S.) 576; *Llewellyn v. Jersey*, 11 Mees. & W. 183; *Taylor v. Parry*, 1 Scott, N. 576; *Thomas v. Hatch*, 3 Sumn. 170; *Otis v. Moulton*, 2 Appl. 205; *Heaton v. Hodges*, 2 Shepl. 66. See *Cain v. Dodge*, 3 Strobb. 115; *Lincoln v. Wilder*, 29 Maine, 169; *City, &c. v. Illinois, &c.*, 12 Illin. 38; *Hobbes v. Parker*, 31 Maine, 143.

(2) *Ripley v. Berry*, 5 Greenl. 24.

(3) *Loring v. Norton*, 8 Greenl. 61; *McClintock v. Rogers*, 10 Ired. 256.

(4) *Crosby v. Parker*, 4 Mass. 110.

(5) *Mason v. White*, 11 Barb. Sup. Ct. 173.

(6) *Ib.*

held, the plan was the more certain monument, and must control the other, the two being inconsistent. *Lincoln v. Wilder*, 29 Maine, 169.

Where, in a deed, reference is made to another deed, as recorded in a particular book and page of the registry, for a description, a copy of the record of that deed is admissible in evidence in connection with the former deed. *Clough v. Bowman*, 15 N. H. 204.

Votes and resolutions of the general assembly, and the acts of their committees, cannot be referred to for a description of the premises, intended to be conveyed by an agent of the general assembly, unless they are referred to in a deed for that purpose. *Kenyon v. Nichols*, 1 R. I. 411.

(a) Where the original corners and lines are proved, they control courses and distances. But the latter govern, where there are no established objects to control them. *Nelson v. Hall*, 1 McLean, 518.

dam on said falls to a certain road." Held, this was a description of the boundary of the land itself, and not of the height to which the pond might be raised.(1)

114. With regard to the words used to express boundaries; *to*, *from*, and *by*, are terms of exclusion, unless by necessary implication they are manifestly used in a different sense. The word *between* necessarily excludes the *termini* named. So a conveyance, bounded *on* other land, cannot include such land.(2)(a)

115. A deed, conveying all the grantor's lands between certain specified lines or boundaries, is not void for uncertainty.(3)

116. Where a deed contains precise boundaries, and also mentions a certain quantity of land, the former controls the latter description; nor does the latter amount to a warranty that there is that quantity of land, but is merely a part of the description; even though worded somewhat in the form of a covenant; as, "the lot to contain 200 acres by measure."(4)

117. So "containing so many acres, be the same more or less," are merely words of description, and, if deliberately inserted without fraud, Chancery will not relieve for deficiency of quantity.(5)(b)

117 a. But where one conveys by courses and distances, and his covenant of warranty extends to the entire quantity of land included by them, the farther description of it in his deed, as a tract which had passed to him by a chain of conveyance, will not restrain the warranty to the primitive bounds of the tract.(6)

117 b. A deed conveyed a tract of land by metes and bounds, specifying the number of acres, and covenanted as follows: "To have and to hold, to him, the said A, his heirs and assigns, the right and title of the same I warrant and will ever defend." Held, that this was only a covenant for quiet enjoyment, and not a warranty as to the number of acres mentioned in the deed.(7)

117 c. In a deed, the descriptive part ascertained a whole tract, de-

(1) Hull v. Fuller, 4 Verm. 199.

(2) Bradley v. Rice, 1 Shepl. 201; Revere v. Leonard, 1 Mass. 91; Nash v. Atherton, 10 Ohio, 163.

(3) Ward v. Bartholomew, 6 Pick. 409; Haven v. Richardson, 5 N. H. 113.

(4) Barksdale v. Toomer, 1 Harp. 290; Large v. Penn, 6 S. & R. 488; Powell v.

Clark, 5 Mass. 355; Perkins v. Webster, 2 N. H. 287; Peden v. Owens, Rice, 55.

(5) Mann v. Pearson, 2 John. 37. (See Thomas v. Perry, 1 Pet. Cir. 49.) Mervin v. Bennet, 8 Paige, 312.

(6) Steiner v. Baugman, 2 Jones, 106.

(7) Huntley v. Waddell, 12 Ired. 32.

(a) Where the words *on*, *by*, or *to* a certain stream are used, the flats will pass, and sometimes the land to the centre of the river. Whether the words *on the bank* will be so construed, *qu?* If reference is also made to fixed monuments on the bank, the flats will not pass. Thomas v. Hatch, 3 Sumn. 170. See Smith v. Powers, 15 N. H. 546.

Land was described, in different deeds, as bounding "on the mountain," and "by the mountain," and "the foot of the mountain." Held, these words were too indefinite and uncertain to control the courses, distances and other references in the deeds, descriptive of the land. Also, that it was a question depending both on law and fact, whether these words excluded or included a certain part of the mountain, and this question should have been submitted to a jury, under such directions from the court, as to the rules of construction, as were applicable to the case. Also, that it might be important, in order to decide this question, to ascertain the location of adjoining lots of land. Williston v. Morse, 10 Met. 17.

(b) The number of feet, mentioned as the length of a boundary line, is to be taken as the true length, though "more or less" be added, unless either the deed or the situation of the land in some way control this construction. Blaney v. Rice, 20 Pick. 62.

clared that part of it was claimed by A, and specified that the grantor only conveyed 200 acres; that he did not convey the part claimed by A, but, if it should be found that, besides the part so claimed, there was more than 200 acres, the grantee should have it. A general warranty of the premises was added. It was found that A's claim covered all but 142 acres; and the grantee sued the grantor in covenant, alleging a warranty of 200 acres, and a breach by reason of A's claim. Held, the stipulations in the deed amounted to a covenant that there were 200 acres conveyed, which were not covered by A's claim; and that the plaintiff was entitled to recover the value of 58 acres.(2)

118. Where a deed bounds upon a way or street, this is not a mere description, but a covenant that such way exists, and that the grantor and his representatives will not obstruct it. But the extent of the covenant shall be limited by the description in the deed, to which an actually existing way corresponds; and shall not be commensurate with the whole land.(3) And, where land is described as bounded upon a street in the rear, which is not actually opened, but merely laid down upon a map, and there is also a front access, this is not an implied grant of a way in such street, or a covenant to open the same.(4)(a)

119. The above principle (sec. 116) is also applicable to the case of a mere *agreement* for a conveyance, which is accordingly afterwards made. Thus, if the agreement states the quantity of land, and the deed states it in the same way, with the addition of *more or less*; in a suit upon a note given by the purchaser of the land, it is no defence that the quantity fell short of the amount specified, although this fact would have been a defence to a suit upon the agreement. The agreement is merged in the conveyance.(5)

120. But, where the deed mentions a certain number of acres, sets out the bounds, and then adds, "the nine and a half acres I warrant, be the same more or less;" this is a warranty of *the quantity*.(6)

121. Introductory words in the description of the property conveyed, which consists of two distinct parcels, will be applied to the whole property, though in form connected only with the first mentioned parcel. Thus, where the description was "*the one half of the land hereafter described, &c., thus bounded, &c.; the one half of the whole of said land, &c.; and also, one other piece of land, &c., bounded thus,*" &c.; held, one-half only of the last-named parcel passed by the deed.(7)

122. A grantor, having three undivided quarters of a farm, conveys

(2) *Morris v. Owens*, 3 Strobb. 199.

(3) *Mercer Street*, 4 Cow. 542.

(4) *Parker v. Smith*, 17 Mass. 413.

(5) *Haggerty v. Fagan*, 2 Penns. 533;

(*Smith v. Evans*, 6 Binn. 102; *Crotzer v. Russel*, 9 S. & R. 80; *McLelland v. Creswell*,

13, 143; *Houghtaling v. Lewis*, 10 John. 297; *Stebbins v. Eddy*, 4 Mas. 414.

(6) *Crawford v. Crawford*, 1 Bai. 128.

(7) *Hapgood v. Whitman*, 13 Mass. 464.

(See *Tyler v. Hammond*, 11 Pick. 193; *Doe v. Anderson*, 1 Star. 155.)

(a) Where streets were laid out on land adjoining a town, by the owner of the land, some of which were in continuation of the public streets of the town, and lots on these streets were sold by the owner, bounding on the streets by their names, and some of the streets were sold to the trustees of the town; it was held, after the lapse of many years, that the owner of the land could not maintain an action against the town for the land covered by the streets, or for compensation therefor. *Wickliffe v. Lexington*, 11 B. Mon. 155.

one equal moiety of the farm by metes and bounds, "together with all the estate, right, &c., which he hath to the above described premises." Held, only a moiety passed.(1)

123. But, where one conveyed "one half of an undivided tract, lying, &c.; also a tract lying, &c.; also one half of an undivided tract of woodland," &c.; and his wife released her dower in the undivided one half of the above premises; held, the whole of the second tract passed, and parol evidence was inadmissible of an intention to pass only one half of it.(2)

124. An administrator conveyed land of his intestate, with the exception of the widow's dower therein. Held, the reversion, expectant upon dower, passed.(3)

125. A tract of land may acquire, by reputation, a name different from that which it bears in the patent, and may pass by such acquired name.(4)

126. The rules above stated, in regard to the description of premises conveyed, relate in general to different modes of description in the same deed. Where a question arises in regard to the construction of different conveyances of the same property, a particular description will control a general one, if the justice of the case so requires; although, under other circumstances, the latter might prevail.

127. A conveys to B a tract of land in Boston by metes and bounds. A afterwards conveyed to C "all the right and title to the land I have in Boston." C's deed was first recorded. Held, the words *all the right, &c.*, must be construed to exclude such part of the land as A had already parted with, *as between him and the first grantee.*(5)(a)

128. A similar principle applies, where a part of land embraced in a grant is out of the control of the grantor; though not by virtue of a prior deed.

129. Thus, where one conveys his right and title in a particular patent, not specifying the quantity or boundaries, and a part of such patent is in the adverse possession of another, only the remaining portion passes by the deed.(6)

130. Where land is described as bounded *on, by* or *to* the sea or salt water, or in any other equivalent mode, not reserving the flats; which, with the upland, belong to the grantor, the conveyance extends to low-water mark, if not more than 100 rods below high-water mark. But one may convey his upland, without the flats, or the converse. And, if a boundary be *to, on, or by the bank of a stream, or by its margin*, the boundary may be limited to the bank.(7) (*Supra*, sec. 64, & sequ. & n.)

131. The *sea-shore*, when mentioned in a deed, means the usual and ordinary margin of the sea, or the ground between high and low-water marks. But, if the deed bounds upon a way or street adjoining the

(1) Jackson v. Stevens, 16 John. 110.

(2) Child v. Wells, 13 Pick. 121.

(3) Leverett v. Armstrong, 15 Mass. 26.

(4) Wall v. Forbes, 1 Harr. & Gill, 443.

(5) Adams v. Cuddy, 13 Pick. 460.

(6) Van Dyck v. Van Beuren, 1 John. 345.

(7) Storer v. Freeman, 6 Mass. 435; Com. v. Charlestown, 1 Pick. 180; Thomas v. Hatch, 3 Sumn. 170; Nickerson v. Crawford, 16 Maine, 245.

(a) A devise of "the Home Plantation" will not pass certain lots formerly included therein, but set off by commissioners under an act of the legislature, procured by the deviser himself. Hampton v. Cowles, 4 Nev. & B. 16.

sea-shore, it does not extend across such way, so as to reach below high-water mark.(1)(a)

132. Where one of the boundaries in a deed is a line to be run up a creek, the line must be run through the middle of the creek, according to its turnings and windings.(2)(b)

133. Where a deed calls for a corner standing on the bank of a creek,

(1) *Ib.*; *Codman v. Winslow*, 10 Mass. 146. See 14 Pick. 411. | *Buckley v. Blackwell*, 10 Ohio, 508; *Bowman v. Farmer*, 8 N. H. 402.

(2) *Jackson v. Louw*, 12 John. 252. See

(a) A *bank* is the continuous margin where vegetation ceases. The *shore* is the sandy space between it and low-water mark. *M'Cullough v. Wainright*, 2 Harr. 171.

The word "beach" designates land washed by the sea, and is synonymous with "shore." *Littlefield v. Littlefield*, 28 Maine, 180.

Where land was described in a deed as containing two and a half acres of salt marsh, and as being within the following bounds—beginning at a corner by the beach, and running by a given line to a creek, and by the creek to a certain marsh, and then by the marsh to a ditch, and then by the ditch to the beach, and running by the beach to the place begun at,—it was held, that the land granted adjoined upon the land washed by the waves of the sea, although the quantity of land within the boundaries exceeded that named in the deed, and was not wholly salt marsh, and although the ditch did not extend the whole distance to the beach. *Ib.*

Whether a lot bounded on a *lake* is limited to the margin of the lake or not, depends upon the manner in which the lake was formed. *Dillingham v. Smith*, 30 Maine, 370.

A boundary on a fresh water pond, which had been permanently enlarged by means of a dam at its mouth, passes the land as far as the low-water mark of the pond, in its enlarged state. *Wood v. Kelley*, 30 Maine, 47.

In general, if in a body of water there be a steady and uniform current, it will be a river. *The State v. Gilmanton*, 14 N. H. 467.

But this definition is not applicable to a lake, in which there may be a uniform current from its head to its outlet. *Ib.*

A body of water lying below the outlet of a lake, through which the waters from the lake pass, and in which there is a steady and uniform current, is a river, although another appellation may have been usually given to it. *Ib.*

(b) A line described as running from one landmark to another, without reference to any intermediate monument or curve line, is to be taken as *straight*; and parol evidence is not admissible to the contrary. *Allen v. Kingsbury*, 16 Pick. 235. But, if a line is to run along a river or creek from one *terminus* to another, it must follow such stream, however sinuous or indirect; and, if the description will not reach the terminus, it must be pursued so far as it conducts towards the *terminus*, and then relinquished for a direct line to the *terminus*. *Shutz v. Young*, 3 Ired. 385. Boundary "along the river," and then by a *marked line*. Held, the former controlled the latter. *Lynch v. Sanders*, 4 Dev. & B. 62.

A grant began on a lake, thence south, then west, then north, then east, certain distances, "with the windings of the lake water to the beginning." Held, though the distance mentioned in the third line should fail before reaching the lake, it must be continued in a direct course to the lake. *Literary, &c. v. Clark*, 9 Ired. 58.

Where a deed bounds "partly on a stream, as the said lot was surveyed by L. L. Esq., reverence being had to the plan," and the plan shows a straight line drawn along the stream pursuing its general course, but crossing the stream at a curvature, and taking in a piece of land on the other side within the curvature, and the lines named in the deed do not entirely surround the tract, but, by substituting the straight line instead of the stream, the tract is surrounded; the straight line is the true boundary, and the land on the other side of the stream, between the curvature and the straight line, is embraced in the deed. *Eaton v. Knapp*, 29 Maine, 120.

Where there are adjoining proprietors of land upon the same side of a stream, each bounded upon the stream, and the corner between them, upon the stream, is indicated by a fixed monument upon the bank; the true corner is at that point in the centre of the stream which is nearest to the monument, and its direction from the monument will be changed by the changes of the course of the stream. *Newton v. Eddy*, 23 Verm. 319.

A farm, bounding at one end on a river, was a little wider at that end than the other. One half of the farm was conveyed by deed, separated from the other half by a line, beginning at the river and running back, "holding its width equally alike" the whole length of the farm. Held, the deed passed a strip of equal width throughout, and a number of acres equal to that retained by the grantor. *Patterson v. Trask*, 30 Maine, 28.

Where a certain course is described from one corner to another, not referring to a line of

"thence down said creek with the several meanders thereof," the boundary is the water's edge at low-water mark.(1)

134. The next clause in a deed is *the exception*, (a) by which something is excepted from the property previously granted. It is said, the following circumstances are necessary to a valid exception: 1. Apt words. 2. The thing excepted must be a part of what is previously granted, and not of any other thing. 3. It must be a part, not the whole of the thing granted. 4. Something severable from the grant, not an inseparable interest or incident. 5. Something that the grantor may retain. 6. A particular thing out of a general one, as, out of a farm an acre; not a particular out of a particular one. 7. It must be certainly described and set down.(2)

135. If there is a clear and undoubted grant in the former part of a deed, and afterwards words are added which are repugnant and contradictory, or uncertain, the latter may be rejected; but, where the words are ambiguous, or so mixed up with other words as to show an intent different from the common effect of some of the words, if taken by themselves, the subsequent words may be used to ascertain the real intent of the instrument.(3)(b)

136. An exception shall be taken most favorably to the grantee, in case of any uncertainty. Thus, if a *building* is reserved, wherein a machine is then in operation, this does not embrace the land, nor any new building subsequently erected. So, where a deed conveys the land by metes and bounds, "excepting a road laid out through the premises by a committee, &c.;" only an easement is reserved to the grantor.(4)

(1) *M'Culloch v. Aten*, 2 Ohio, 309; *Buckley v. Gilmore*, 12, 63. See B ctkon v. Chesnut, 4 Dev. & B. 335.

(2) Co. Lit. 47 a; Touch. 77; (Thomas v. Pickering, 1 Shepl. 337.)

(3) *W de v. Howard*, 6 Pick. 499-500.

(4) *Jackson v. Hudson*, 3 John. 375; *Mar-*

shall v. Niles, 8 Conn. 369; *Palmer v. Warren Ins. Co.*, U. S. C. Ct. Mass. Oct. T. 1840; *Law. Rep. July*, 1841, p. 98; *Leavitt v. Towle*, 8 N. H. 96. See *Waigh v. Richardson*, 8 Ired. 470; *Gronen v. Howard*, 31 Maine, 546.

marked trees, and the corners are both proved; the direct line between them is the boundary, although there is such a line of trees between, varying from the direct line. Otherwise, where a line of trees is called for, in addition to the course above-mentioned. *Hough v. Horn*, 4 Dev. & B. 228; *Wynne v. Alexander*, 7 Ired. 237. If there be a grant along a highway from one corner to another, and such corners are proved, the way will be the boundary, though varying from the course. And, if there are two tracks, the jury must settle which is the public road. Ib.

Commissioners were appointed to divide a tract of land between the joint owners. They fixed the corners of the dividing line, and intended that the division should be by a straight line from one of these corners to the other; and the line was so described in their report, and so laid down on the plat which they returned to court. In fact, however, the land being covered with a thick wood, the line which they marked was not straight. In cross actions of ejectment and trespass between the owners of the two tracts, it was held, that the true division line was the line as it was intended to be, and not the line marked on the land. *Smith v. Davis*, 4 Gratt. 50.

Where a boundary line is described as running parallel with, and within seven inches of, a certain wall, but its length is not given; the line runs as far as the grantor has a right to extend it, in order to give effect to the grant. *Dall v. Brown*, 5 Cush. 289.

(a) It is said, however, that a reservation may be made in the premises, the clause of grant, the *habendum*, or *reddendum*. *Stambaugh v. Hollabaugh*, 10 S. & R. 362.

(b) One owning land, with a mill privilege thereupon, conveyed to A, a son. "the use, &c., of one half of the saw-mill," and, the same day, to B, another son, the tract including the mill, "except the privilege of half the saw-mill, conveyed to A and his heirs." Held, the grant and reservation should be construed together, and one half of the mill and privilege passed by the conveyance. *Moore v. Fletcher*, 4 Shepl. 63.

137. An exception, wholly repugnant to the grant, is void. If in part repugnant, it is matter of construction, not of limitation; and, as the law will not intend an error or falsehood, the grant shall be held not to include the part excepted. And the omission of the word *heirs* in the exception, shall not confine the interest retained by the grantor to a mere life estate. It would be otherwise with a reservation.(1)

138. Grant of land, excepting one acre and one half acre, reserved for the use and flowing of water for a mill. Held, the exception was void for uncertainty.(2)

138 a. An exception is not void, merely because to some extent it is inconsistent with the grant, unless, by giving effect to the exception, the grant would become wholly inoperative.(3)

138 b. Where a grantor, under whom both parties claim, has conveyed the whole of a tract of land by metes and bounds, specifying its contents, and then excepted out of it a certain number of acres, without giving a particular description of them; the defendant may show, by reference to other deeds and surveys, that the premises in question were part and parcel of the number of acres excepted, and in fact belonged to the grantee at the time of making his conveyance.(4)

139. An exception is to be distinguished from a reservation.(α) The former is always part of the thing granted. The latter is of a thing not *in esse*, but newly created or reserved. It is also to be distinguished from an *explanation*.(5)

140. A grantor releases all his right, &c., in *one undivided moiety* of certain land, situated, &c. The succeeding clause, by reference to another deed, and by implication only, would reduce this moiety to a fourth part. Held, the latter clause, with reference to the former, could not operate as an *exception*, the grant in the former clause being not *general* but *certain*; nor as a new reservation, which must be of some new right not before *in esse*, or perhaps some pre-existing easement; nor as an *explanation*, which, by a *videlicet proviso*, &c., is allowed only to explain doubtful clauses precedent, or to separate and distribute generals into particulars, but never to restrain or diminish what is expressly granted, but is rather held void for repugnancy; and that this clause was repugnant and void.(6)

(1) Hay v. Storrs, Wright, 711.

(2) Darling v. Crowell, 6 N. H. 421.

(3) Adams v. Warner, 23 Verm. 395.

(4) Corderey v. Conover, 1 Spencer, 320.

(5) Co. Lit. 47 a. See Hatch v. White, 22

Pick. 518; Hinman v. Booth, 21 Wend. 267;

Sergeant v. Ford, 2 Watts & S. 122; Baker

v. McDowell, 3, 358; Doe v. Lock, 4 Nev. &

M. 807; French v. Carhart, 1 Comst. 96.

(6) Cutler v. Tufts, 3 Pick. 272.

(α) The distinction does not depend on the use of the words "except" or "reserve," but upon the nature and legal effect of the provision itself. Gale v. Coburn, 18 Pick. 400. As to the distinction between these and a condition, see Parsons v. Miller, 15 Wend. 564. In Georgia, by a late statute, *burial-grounds* may be legally reserved by a grantor. So officers, executors, &c., are required to reserve them. St. 1842, 38. A distinction is sometimes made between an *exception* and a *new grant*. Durham, &c. v. Walker, 2 Ad. & El. (N. S.) 940. See Hurd v. Curtis, 7 Met. 94; Bowman v. Wathen, 2 M'L. 376. The expression "reserving to the grantor the use and control, &c., during his natural life," gives him a life-estate. Richardson v. York, 2 Shepl. 216.

Where a grantor reserves the privilege of entering the land, and taking and carrying away stone therefrom; this is not a reservation of a mere personal privilege, but of a right and interest in the use of the land, which he may assign. Munn v. Stone, 4 Cush. 146

A reservation in a deed of a right or privilege should be construed in the same way as a grant, by the owner of the soil, of a similar right or privilege. French v. Carhart, 1 Comst. 96

141. Conveyance, excepting and reserving *all mineral or magnesia of any kind*, &c. Held, the word *magnesia* was not to be construed as a restriction or qualification of the words *all mineral*, but as additional thereto; the fact that magnesia is a mineral being generally unknown, except to scientific men.(1)

142. A deed *reserved* all the pine timber upon the land of a certain size. Held, the pine timber trees continued to belong to the grantor while they lasted, with so much of the soil as was necessary for their support.(2)(a)

143. An exception of "a small quantity struck off a tract by a conditional line" is, it seems, void for uncertainty, if there is no such line ascertained, or capable of being ascertained. An exception, however, may validly be made in such form, that, though uncertain at the time, the grantor may afterwards make it certain.(3)

144. Conveyance of land, "excepting and reserving, &c., so much as is necessary for a grist-mill, on the east side of the road, at the west end of the saw-mill." Held, although this constituted a good exception, it did not take effect till a mill was begun to be built, previous to which, the grantee might have trespass even against the grantor for an entry upon the land, except for the purpose of such erection.(4)

145. On the other hand, where the reservation is of a right to cut timber, &c., in the woods not appropriated or fenced in, the right ceases as soon as the lands are fenced.(5)

146. Conveyance of land upon which was a large quantity of free-stone, disconnected from any ledge, and partly imbedded in the ground. The grantor reserves to himself, his heirs, &c., *all the free-stones* on said land, with the privilege of carrying them off. Held, the reservation did not embrace a subterraneous ledge of free-stone, which was not known to the parties at the making of the deed. Also, that this ignorance, and the condition of the land and the stones at the time, might be proved by parol evidence.(6)

147. A reservation or exception to a stranger is void, on the same principle that, upon a bargain and sale, a use can be limited only to the bargainee. Thus, a proviso in a deed from trustees, authorized to convey to A, that the inhabitants of B, not a corporation, shall be allowed to cut and carry away wood from any open part of the land, is void. So a *reservation*, in a deed of A's land, from A and B his wife, of the use of the land for their lives, is void *as such*, in regard to B, who stands as a stranger.(7)(b)

(1) Gibson v. Tyson 5 Watts, 34.

(2) Howard v. Lincoln, 1 Shepl. 122.

(3) Stambaugh v. Hollabaugh, 10 S. & R. 357.

(4) Dygert v. Mathews, 11 Wend. 35; Thompson v. Gregory, 4 John. 81.

(5) Tenbroeck v. Livingston, 1 John. Cha. 357.

(6) Putnam v. Smith, 4 Verm. 622. (See Leonard v. Judd, Bray. 230.)

(7) Hornbeck v. Westbrook, 9 John. 73; Jackson v. Swars, 20 John. 87; Voorhees v. The Presbyterian, &c., 8 Barb. 135.

(a) If a man lets his manor, except the woods, underwoods, &c., the soil is excepted. 2 Rolle's Abr. 455.

(b) The following decisions illustrate the several principles stated in the text. Where a demandant claims under a deed with exceptions, the burden is on him to show that the land is not within such exceptions. Bussey v. Luce, Maine S. J. C., June 1841; Law Rep., Sept. 1841, p. 201.

So, where a deed of a township excepts from its operation certain tracts therein, amount-

148. The clauses of a deed above described are parts of *the premises*. Next follows the *habendum*. The office of the habendum is not to grant the estate, but only to limit its certainty, and name the grantee. Hence, it is the general rule that no one can claim under a conveyance, unless he is named in the premises. To this rule, however, there are some exceptions.(1)

(1) 4 Cruise, 226-7: *Sumner v. Williams*, | *v. Garfield*, 10 Verm. 592; *Moss v. Sheldon*,
8 Mass. 174; (*Wager v. Wager*, 1 S. & R. | 3 Watts & S. 160.
375;) *Powell v. Brown*, 1 Bai. 100; *Strong*

ing to half the whole township; it is incumbent on the grantee, claiming title to a particular lot under such deed, to show that such lot is not included in the excepted tracts. *Smith v. Bodfish*, 27 Maine, 289.

Conveyance of land, with all the buildings thereon *except the brick factory*. Held, neither the land under the factory, nor the water-privilege appurtenant, passed with the deed. *Allen v. Scott*, 21 Pick, 25.

A deed of all the grantor's lands in a certain district, with the reservation of so much, to be taken in any place that he may elect, passes the whole, subject to the right of receiving back such part upon making the election. *Thruston v. Masterson*, 9 Dana, 233.

Conveyance by A and B, to D, and reserving to A, B and C, their heirs and assigns, a right to hunt, hawk, &c. The deed was signed by D. Held, though void in relation to C, as a *reservation*, it was valid as a *new grant*. *Wickham v. Hawker*, 7 Mees. & W. 63.

Proprietors of common and undivided land voted to convey to a parish a parcel thereof, on which a meeting-house had been erected, "reserving to the inhabitants of the town the privilege of occasionally holding town meetings in said meeting-house," and authorized a committee to execute a deed. The committee executed a deed, which recited the vote, but made no reservation in the granting part thereof. Held, that the deed conveyed the land, subject to the reservation in the vote. Held, also, that a person who bought the meeting-house of the society had notice of the reservation, by the record of the deed, and took the house subject to the right of the town to hold meetings therein whilst it should stand on the land conveyed by the proprietors. *Goff v. Rehoboth*, 12 Met. 26.

Where a deed contains no reservation of the growing crop, such reservation cannot be proved by parol. *Gibbons v. Dillingham*, 5 Eng. 9.

In a deed, there was reserved to the grantor, his heirs and assigns, who should occupy the house adjoining, the right to take water freely from the well on the premises, or from any other well which might be sunk there. Held, the grantee was not bound to keep the well in repair, but might stop it up, by building over it. *Ballard v. Butler*, 30 Maine, 94.

A granted his son B a farm, in consideration of natural affection, "excepting and reserving" to his three daughters, C, D, and E, the right of being upon the farm and being supported from it so long as they remained single. Held, there was in the deed neither a legal exception nor reservation; but, as B had accepted the gift, he and his descendants were estopped to deny its conditions, and the three daughters were entitled to a support from the farm, or its proceeds, if it was sold. *Maynard v. Maynard*, 4 Edw. Ch. 711.

Reservation of "one square acre, containing my family burial ground." Before delivery of the deed, the lot reserved was staked out at the request of the grantee. Held, in an action of trespass for an injury to a tree within the limits so fixed, that the boundaries so fixed by the parties must govern, notwithstanding the rule, that a deed must be taken most strongly against the grantor, yielded to this parol establishment of the boundaries. [*WARD-LAW, J.*, dissenting.] *Altman v. McBride*, 4 Strobh. 208.

The plaintiff, being the uncle and step-father of the defendants, who resided in his family, executed and delivered to them, without consideration, a quit-claim deed of his real estate, containing the following clause immediately after the description of the premises: "reserving to myself the use and improvement of said property during my natural life; also to dispose of any part thereof, should it be necessary for my support." A deed was executed by the plaintiff, under a belief that such reservation was legal, and effectual to enable him to sell such part of the property as should be necessary for his support. On a bill in chancery to have this conveyance set aside, on the ground of a mistake of the plaintiff as to its legal effect, without showing that he needed the avails of the property, or any part of it, for his support; held, until the exigency contemplated by the reservation had happened, the application for relief was premature; and, therefore, the bill was dismissed. *Coley v. Coley*, 19 Conn. 114.

In Connecticut, a reservation, in a deed of land, of the use and improvement of the property conveyed, during the grantor's life, is valid and effectual. *Id.*

A devise to the heirs male of the testator, reserving a living to himself and his wife for lives, is a devise of the legal title to these heirs; and the reservation is in the nature of a charge payable out of the land. *Hamilton v. The Overseers*, 2 Jones, 147.

149. If no grantee is named in the premises, one named in the *habendum* may take. So, where other parts of the deed indicate such intention, a fee may pass, though there are no words of grant in the premises.(1)

150. A remainder, or a use, may be limited in the *habendum* to one not named in the premises.(2)

151. A, by indenture with B and C, bargained, sold and enfeoffed to B, to hold to the said B and C, their heirs, &c., to the use of them, their heirs, &c. Held, while the feoffment was good to B only, the use was executed in C also, from the seizin of B.(3)

152. A deed contained the name of the person who paid the purchase-money, and with whom the covenants were made, but not the name of any grantee. The *habendum* was to the grantor in fee. The covenantee entered, occupied several years, and conveyed away the land. In a writ of right against his grantee, brought by the original grantor, held, the first deed passed nothing, and could not qualify the covenantee's possession; the character of which, therefore, was purely a question for the jury.(4) (See sec. 155.)

153. The thing granted, as well as the grantee, must be named in the premises. It is not sufficient that it be contained in the *habendum*. Thus, the grant of one manor, *habendum*, "together with another," passes only the former. But if a thing is included in the premises, though differently named in the *habendum*, it still passes.(5)

154. The distinction upon the subject is, that, though the *habendum* may enlarge the estate, it can never extend the *subject matter*. Thus, if the premises convey merely a piece of land, and the *habendum* speaks of "the premises with all their appurtenances," a right to the use of water, conducted artificially upon the land from other land of the grantor, does not pass.(6)(a)

155. If the *habendum* is repugnant to the premises, it is void. The grantor is not allowed to retract what he has once granted. Thus, if the premises convey to A, and the *habendum* the same estate to B, A takes the whole. So, if the grant is made to A and his heirs, *habendum* to A for life, A takes the fee. So a grant to A and B, *habendum* to A for life, remainder to B for life, makes A and B joint tenants for life. And where the *habendum* of a bargain and sale is to the grantor, it shall be rejected, and the use enure to the grantee.(b) So where the premises give an immediate, and the *habendum* a future estate, the latter shall not defeat the grant, as being *in futuro*.(7)(c)

(1) Big. Dig. 211; Stearns v. Godfrey, 4 Shepl. 158; 4 Dev. & B. 433.

(2) Co. Lit. 21 a, 7 a, u. 3; Touch. 75; 4 Dev. & B. 433.

(3) Sammes' case, 13 Rep. 55.

(4) Paul v. Moody, 7 Greenl. 455.

(5) 4 Cruise, 227; Plow. 157.

(6) Manning v. Smith, 6 Conn. 289.

(7) Co. Lit. 299 a; 8 Rep. 56 b; Plow. 153; Bend v. Susquehanna, &c., 6 Har. & J. 132; Goodtitle v. Gibbs, 5 B. & C. 709; Hofner v. Irwin, 4 Dev. & B. 433; Budd v. Brooke, 3 Gill, 198.

(a) So covenants cannot enlarge the premises, but may aid in their construction, if doubtful. Mills v. Catlin, 22 Verm. 98.

Quit-claim deed from A to B, "to have and to hold the afore-mentioned premises to B, his heirs, &c., so that neither I, &c., shall or will, &c., have, &c., any right or title to the aforesaid premises." Held, a covenant of warranty or quiet enjoyment against all claiming under or from A. Newcombe v. Presbrey, 8 Met. 406.

(b) See sec. 152.

(c) Deed to A, a daughter, and the heirs of her body begotten and to be, &c., who shall

156. But where a conveyance cannot take effect according to the premises, but may take effect according to the *habendum*; it shall operate in the latter mode. Thus, in England, where a freehold does not pass without livery, if A, by indenture, covenant, grant, demise, and to farm let lands to B and his heirs, *habendum* to him for 99 years, and livery be made; an estate for years, and not at will, passes by the delivery of the deed, such being the apparent intent of the parties.(1)

157. In many cases, the *habendum* may abridge, enlarge, or qualify the premises. Instances of this kind have been referred to in treating of Uses, &c., (Vol. I., ch. 21, sec. 13,) and of the words necessary to create estates (Vol. I., ch. 56.)(a)

158. So, where the premises contain no words of limitation, and would therefore pass a life estate, but an estate for years is given in the *habendum*; the latter limitation takes effect. So a grant to A and his heirs, *habendum* to him and his heirs for three lives, creates an estate for three lives. So a lease to A and B, *habendum* one moiety to A, the other to B, makes them tenants in common, though by the premises they would be joint tenants (in England.) So a grant to A for life, *habendum* to him and his heirs, passes the fee.(2)

159. A warranty "to A and his heirs forever," may be limited, by the *habendum*, to an estate tail.(3)

160. A deed, made to three grantees, recites a devise to one of them during widowhood, and the remainder in fee to the others, and declares its object to be, to effect the intent of the testator. The deed then grants the land to the three persons in fee, "*habendum* to them, their heirs and assigns, in the manner mentioned in said will." Held, the *habendum* was consistent with, and should control, the premises.(4)

161. The words contained in the premises of a deed are called words of *purchase*; those in the *habendum*, words of limitation. The former vest an estate in the grantee by their own operation; the latter take effect only by their reference to and connection with another clause of the deed.(5)

(1) Baldwin's case, 2 Rep. 23.

(2) Edward, &c. case, 8 Rep. 154 b, 155 a; 1 Rolle's Abr. 68; Pilsworth v. Pyet, T. Jones, 4; Co. Lit. 183 b, 190 b, 299 a.

(3) Co. Lit. 21 a, n. 1.

(4) Jackson v. Ireland, 3 Wend. 99.

(5) 4 Cruise, 229; Fearne, 108.

survive her, to be equally divided among them; *habendum* to A for life, afterwards to her issue, as above described and conditioned, to the only proper use of A and her issue, as aforesaid, their and each of their heirs and assigns, in the proportion and manner aforesaid, forever. Held, A took an estate for life, remainder in fee to her children. Moss v. Sheldon, 3 Watts & S. 160.

The owner of adjoining lots of land, from one of which a drain was constructed through the other, sold and conveyed the former by a deed in which the *habendum* was: "To have and to hold the afore-granted premises, with the privileges and appurtenances thereto belonging at the time of the purchase thereof by the said T and F:" at which time the drain had not been constructed. In an action of trespass by the grantor against the grantee, for entering upon the land of the plaintiff, for the purpose of making necessary repairs upon the drain; held, as the *habendum* contained no negative or other terms restricting the legal effect of the grant, the deed conveyed whatever was necessary to the beneficial enjoyment of the estate granted, which it was in the power of the grantor to convey; and, as the plaintiff then owned the land through which the drain passed, and had power to convey the right to use the same, such right passed by the deed, if it was necessary to the beneficial enjoyment of the estate granted. Thayer v. Payne, 2 Cush. 327.

(a) Devise of freehold, leasehold and copyhold to A, B and C, *tenendum*, the freehold and leasehold in trust for A. Held, the copyhold descended to heirs. Stubbs v. Sargon, 2 Keen, 255.

162. Sometimes the same words may operate both by way of purchase and of limitation. Thus, the conveyance of a remainder to *the right heirs* of A passes a fee to such heirs, without the addition, *and their heirs*. So a limitation, to the heirs male of the body of A, gives an estate to the eldest son of A by purchase, and to his male issue by descent.(1)

CHAPTER LXXXV.

TITLE BY DEED. CONDITION AND WARRANTY.

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|---|---|
| <ul style="list-style-type: none"> 1. Condition, words which create—<i>condition, covenant, and limitation.</i> 11. Warranty, doctrines of, obsolete. 12. Express or implied. 13. Heirs, whether bound by. 14. Circumstances necessary to. 15. History of warranty. • | <ul style="list-style-type: none"> 16. Exchange. 17. Partition. 18. <i>Lineal</i> warranty. 21. Amount recovered upon. 22. <i>Collateral</i> warranty; and statutes relating to. 30. Warranty in the United States. |
|---|---|

1. THE clause in a deed, which usually succeeds those referred to in the last chapter, is *the condition*. The general subject of *estates on condition* was considered in the former volume, as also the most usual and important modification of such estates, viz. *a mortgage*. But little, therefore, remains to be said as to the construction of the condition in a deed.

2. Apt words are necessary to create a condition in a deed, which might not be requisite in a devise. It may be created by the phrase *on condition, provided, or so that*. The words *if it happen* do not make a condition, unless followed by a clause of re-entry. Thus, where A grants lands to B in fee, and *if or if it happen that B do not pay A £10 at Easter*, this is no condition. Otherwise, if a right of re-entry is added.(2) (See Vol. I, *Condition*.)

3. The words *so that*, and *on condition*, may sometimes operate as a *qualification* or *limitation*, and sometimes as a *covenant*. When inserted among the covenants in a deed, in order to operate as a condition, the clause containing such words must stand by itself, independent of any other: it must be compulsory upon the grantee, &c., and come on the part, and by the words of the grantor, &c., and be applied to the estate, and to some other matter.(3)

4. Thus, if a conveyance contains this clause, after the *habendum* and reservation of rent, and among the covenants, “provided the grantee re-grant, &c., for the life of the grantor;” this is a good condition.(4)

5. The same clause may contain both a condition and covenant; as, “provided always, and the feoffee doth covenant,” &c. But if the

(1) Co. Lit. 10 a.

(2) Lit. 329-30-1; Touch. 122. (See *Watchman v. Crook*, 5 Gill & J. 239; *Gray v. Blanchard*, 8 Pick. 284; *Jackson v. Allen*, 3 Cow. 220; *Cook v. Trimble*, 9 Watts, 16;

Michigan, &c. v. Hastings, 1 Dougl. 225; — *v. Hammond*, Ib. 527.

(3) 4 Cruise, 292; Touch. 122.

(4) Ib.

clause depend upon another clause; or if it is the language of the grantee to obligate the grantor; it is a covenant only.

6. In a lease from A to B, B covenants to scour the ditches, *provided* A shall carry away the earth. This is a covenant on the part of A. So where B covenants to repair, *provided* A find the timber.(1)

7. Deed, "in consideration of \$160, and a comfortable living to be given to the grantor, &c., for their lives, by the grantee." Held, no condition.(2)

7 a. A lease contained numerous covenants on the part of the lessees for payment of rent, &c., with a proviso for re-entry on breach of any one of them; and also a proviso, that if the lessees should give notice to quit eighteen calendar months before the end of the eighth year, then, and in such case, all arrears of rent being paid, and all the covenants and agreements on the part of the lessees having been observed and performed, the lease, and every clause or thing therein contained, should, at the expiration of the eighth year, be utterly void, but nevertheless without prejudice to any claim or remedy which any of the parties might then be entitled to for breach of any of the covenants. Held, that performance of all the covenants by the lessees was a condition precedent to their right to determine the lease.(3)

8. It is said, a clause applied to some other thing, and not to the thing granted, is no condition; as where rent is reserved at B, *provided* that in a certain event it shall be paid at C; or a lease is made without impeachment of waste, *provided* that the lessee shall not pull down the houses; or a lease reserving rent, *provided* the lessor shall not dis-train. This last is said to be a good condition, but not annexed to the estate.(4)

9. The word *if* may create a *limitation* as well as a condition; as in case of a lease for years, "if A shall live so long."(5)

10. A condition may be created in a lease for years, without formal and technical words, *provided* the intention appears; as, for instance, by the words of the lessee, as well as those of the lessor. Thus, where a lessee covenants that, if he alienate, the lessor may re-enter; it seems, the lessor may treat this as a condition, but not as a covenant also.(6)

11. The next, and a very important clause in a deed, is that containing *the warranty and covenants*. This clause, it is to be observed, is found only in deeds of *grant*, or *bargain and sale*, or, as they are often termed in the United States, *warranty deeds*; not in those of mere *release* or *quit-claim*. It is said, the learning of warranties abounds in the old books, and is distinguished for its abstruseness and subtile distinctions. Lord Coke declared it to be "one of the most curious and cunning learnings of the law." But it has now become, even in England, a matter of speculation rather than of use; and Chancellor Kent presumes that the remedy never had any existence in any part of the United States, but has been superseded by *personal covenants*.(7)

(1) *Ib.*; Co. Lit. 203 b.

(2) *Cook v. Trimble*, 9 Watts, 15.

(3) *Friar v. Grey*, 5 Eng. Law and Eq. 480.

(4) 4 Cruise, 293.

(5) Co. Lit. 204 a, 214 b; Touch. 123.

(6) *Ib.*

(7) 4 Kent, 470; *Piatt v. Oliver*, 3 McL. 27.

12. A warranty is either *express, in deed, or implied, in law*. The former can be created by no other word than *warrant*.(1)(a)

13. A warranty neither binds, nor can be taken advantage of by heirs, unless the word *heirs* is used, or some other of the same meaning. Nor does a lineal or collateral warranty bind an heir, who takes *as a purchaser*.(2)

14. The following circumstances are requisite to a valid warranty: 1. The warrantor must be under no incapacity or disability. Thus, though the feoffment of an infant is only voidable, his accompanying warranty is void. 2. The warranty must be by deed; if by will, it is void. 3. It must rest upon some estate in the warrantee; for if no estate, or one that is not good, passes by the deed, the warranty is void. 4. Such estate must be freehold. A warranty in a lease for years is void *as such*, though it may be good as a covenant. 5. The estate, to be barred by a warranty, must be divested and turned to a right, before or at the time when the warranty is made; and the person on whom the warranty descends, must then have only a right to the land. 6. An heir shall not be bound, unless the ancestor was also bound. 7. The former must claim in the same right with the latter, and also be of age when the warranty falls upon him.(3)

15. By the feudal law, every feoffment implied a warranty, which bound the lord to recompense the tenant, when evicted from his feud, with another of equal value. By a Statute 4 Edward I, *de Bigamis*, the words *dedi et concessi*, in a deed, created an implied warranty, which bound the donor *and his heirs*, if a tenure was created between him and the donee; or the donor alone, if the donee was to hold of some other party than the donor. After the Statute *quia emptores*, by which tenure was to be always of the chief lord, and not of the immediate donor, the latter construction became the universal one, in conveyances of the fee-simple. But where the owner in fee conveys a less estate than his own, as in tail or for life, the implied warranty binds his heirs, because he retains the reversion, and the tenure is of him. Otherwise, where he limits a remainder in fee; in which case the donor alone is bound.(4)(b)

16. The mode of conveyance called *an exchange* has been already noticed, (ch. 81.) The word *exchange*, (*escambium*,) implies both a condition of re-entry, and a warranty. If one party is evicted from the land conveyed to him, he may either re-enter upon his own land, or recover upon the warranty. But, in the latter case, the recompense shall be confined to the land given in exchange by the warrantee; and only he or his heirs, not an assignee, shall have a remedy against the warrantor. On the other hand, the special character of this warranty enables the party evicted to recover the whole land conveyed by him, though evicted from only a part of that which he received, or from a

(1) Co. Lit. 365 a, 366 a, 384 a; Stout v. Jackson, 2 Rand. 142.

(2) Ib. 383 b, 47 a, 385; Oliver v. Piatt, 3 How. 333.

(3) Touch. 186; Co. Lit. 367 b, 386 a; 2 Rand. 142.

(4) 4 Cruise, 295; Co. Lit. 274, 384 a; 2 Inst. 275.

(a) But, in a deed of general warranty, it is not necessary to use the word "warrant," if other words of equal import are used. Kirkendall v. Mitchell, 3 McLean, 144.

(b) As to the origin of the doctrine of warranty, and its analogy to certain rules of the civil law, see Co. Lit. 365, n. 1.

part of *the estate* in the latter—as, for instance, from a life-estate, parcel of the fee.(1)

17. By the English law, a deed of *partition* between parceners has a similar implied condition and warranty annexed to it, by virtue of which either party, being impleaded, may vouch the other; and, if evicted, either from a part of the land, or a part of the estate in the land, may avoid the partition as to a moiety of what is left. In a late case in Pennsylvania, it was held, that the implied warranty connected with partition applies only to *parceners*, not to tenants in common. The former take *by law*, and were at common law compellable to make partition; neither of which is true of the latter, who are therefore left to provide for their security by special stipulations. The Statute of Henry VIII, which extends to the latter the right of having partition, confines the warranty to partition by legal process; if it creates a warranty even in such a case. It was further held to be doubtful, whether the warranty in question constitutes a personal covenant; and that the general, implied warranty, if any, is controlled by an express and limited one.(2) So, in Vermont, if tenants in common make partition by quit-claim deeds, and the title to a portion of the land fails; the loss falls on the one to whom this portion was allotted.(a)

18. Warranty, with respect to the liability of *heirs*, is either *lineal* or *collateral*. The former is where the heir does or might derive his title from or through the party warranting. Thus, the warranty for himself and his heirs, of a grantor in fee, descends upon his son, and is therefore a lineal warranty. So, where a father, or an eldest son in his father's lifetime, released to a disseisor with warranty; this is lineal to a younger son.(3)(b)

(1) Bustard's case, 4 Rep 121; Co. Lit. 173 b; 2 Rand. 145-6; 1 Pirt. Dig. 211. Watts, 279; Beardsley v. Knight, 10 Verm. 185.

(2) Co. Lit. 173 b; Weiser v. Weiser, 5 (3) 4 Cruise, 297; Lit. 707.

(a) Two tenants in common make partition of their lands, and execute to each other releases in fee. One of them had only a life estate, but after the division the fee descends to him, and he subsequently sells and conveys in fee the part allotted to him. This, it seems, confirms the partition, so he cannot claim any interest in the part allotted to his co-tenant. Baker v. Lorillard, 4 Comst. 257.

A purchaser at a sale, made under an order in proceedings for partition, cannot avoid payment of the purchase-money, on the ground of failure of title. Such sales are at the risk of the purchaser. Owsley v. Smith, 14 Mis. 153.

In Tennessee it is held, that in partition there is an implied warranty between the parties, by which they have the mutual right, in case of an eviction by paramount title, to have compensation from each other; and this right exists in favor of one of the parties, against the alienee of another, but not in favor of an alienee against one of the parties. The remedy is by bill in equity, either by setting aside the partition as founded in mistake, if it can be done without injustice; and, if not, then by a decree of pecuniary contribution. Sawyers v. Caters, 8 Humph. 256.

Where, by a partition deed of land between A and B, a ferry was assigned to A, and it was agreed therein that B should have the right to pass the ferry, toll free, during his life; and this partition was confirmed by a decree of a court of equity; held, this agreement was not a covenant real, which would run with the ferry, and bind an assignee of the ferry; and that an action on the case was not the proper remedy for its violation. Morse v. Garner, 1 Strobhart, 514.

(b) A man cannot bind his heirs to pay money, unless he himself was bound to pay it. Piatt v. Oliver, 3 McLean, 27.

So, the heir is never bound by a warranty, unless the ancestor was bound by it. Ib.

So, a warranty of the ancestor does not bind the heir, where the right does not vest before the fall of the warranty. Ib.

19. A lineal warranty precludes or *estops* the warrantor and his heirs from ever afterwards claiming title to the land. To any such claim the warranty is a perfect defence or rebutter.(1) (See *Estoppel*.)

20. Another effect of a lineal warranty is, that if the grantee is sued for the land by an adverse claimant, he may *vouch*, or call in the grantor to defend; and, if the tenant defend, to give the grantee other lands of equal value. Or a purchaser may at any time bring a writ of *warrantia chartæ* against the warrantor, by which, from the time it is issued, all other lands of the defendant will be bound and charged; or against his heirs, and then only such lands, or to such amount, as descended from the grantor, are bound. These are called *assets*. To constitute assets, the property must be land or its profits, not a mere personal inheritance; the lands must be of equal value at least, at the time of descent; they must be held in fee simple, descend to the party as heir of the warrantor, and be owned in actual estate or interest, not in use, right of entry, or of action.(2)(a)

21. Recovery upon a warranty was of the value of the land at the time the warranty was made, without regard to increased value at the time of eviction, by the discovery of mines, buildings, &c. But the lands *recovered* where valued as at the time of recovery.(3)

22. A *collateral* warranty, is where the heir neither does nor could derive his title to the land from the warrantor; and yet is both debarred from claiming title, and bound to recompense in case of eviction. It has been said that, at common law, no distinction was known but in speculation between lineal and collateral warranty; but the warranty of the ancestor, descending on the heir, whether the one or the other, equally bound.(4) (See *infra*, ch. 86, sec. 48, n.)

23. It is remarked by Judge Story,(5) that "the doctrine of collateral warranty is one of the most unjust, oppressive, and indefensible in the whole range of the common law."

24. The nature of collateral warranty is best explained by an example. If A purchase lands, and B, his father, disseize him, convey with warranty, and die; this is a collateral warranty: because A does not derive title to the land from B, though the warranty descends. And yet A is bound by the warranty.(6)

25. It is said, a collateral warranty was binding on the heir on whom it descended, on the legal presumption that the ancestor would not disinherit him without making him compensation.(7)

26. By statute of Gloucester, (6 Edw. I, c. 1,) where tenant by the

(1) 4 Cruise, 297; Fitzh. N. B. 134; Buckhurst's case, 1 Rep. 1.

(2) Co. Lit. 374 b; Austin v. Gage, 9 Mass. 395; Prop'rs, &c. v. Bullard, 2 Met. 365.

(3) Vin. Abr. Voucher, T. 6; 2 Rand. 143, 145.

(4) Bole v. Horton, Vaugh. R. 366, 375; Den v. Crawford, 3 Halst. 106, 115.

(5) Sisson v. Seabury, 1 Sumn. 262.

(6) Lit. 704-5.

(7) Urquhart v. Clarke, 2 Rand. 559.

(a) In an action upon a writ of entry, the defendants vouched in their immediate warrantors, who appeared and defended. The defendants then called the original warrantor as a witness, and one of the immediate warrantors executed a release to him of his liability upon his warranty. Held, the covenant running with the land could only be discharged by the tenant, and consequently the release to the original warrantor did not render him a competent witness. Crooker v. Jewell, 29 Maine, 527.

Held, further, that the acts of the tenants, in vouching in their immediate warrantors, did not impair their claim against the original warrantor upon the covenant. Ib.

curtesy conveys in fee, the heir is barred to the extent of assets descended, but no further.(1)(a)

27. By statute 11 Hen. VII, c. 20, the warranty of a widow, who conveys her dower estate, or an estate tail derived from her husband, or any of his ancestors, is void.

28. By statute 4 Anne, c. 16, sec. 21, the warranty of tenant for life is void against the reversioner, &c., and a collateral warranty, by one who has no inheritance in possession, is void against his heir. This act is re-enacted in North Carolina. It was also re-enacted in New York in 1788, and adopted in Rhode Island as early as 1749.(2)

29. A warranty ceases with the estate to which it is annexed; as, for instance, with the termination of an estate tail. So it may be discharged by a release, from the warrantee or the holder of the land, of all warranties, all covenants real, or all demands.(3)

30. It has already been remarked, that the common law doctrines of warranty are no longer in practical force, either in England or in the United States.(b)

31. In New York, both lineal and collateral warranties are abolished, with all their incidents. But heirs, who take an interest by descent, are liable upon the covenants of warranty of their ancestor, to the extent of their interests. In Massachusetts, a warranty has no other operation than as a *covenant*. In Connecticut, a collateral warranty by one having no inheritance is void against his heirs. So it has been held in Virginia, that where a husband conveys land of the wife, with warranty against himself and his heirs, his children claiming under the mother are not bound.(4)

32. In New Jersey it has been contended that, although the personal action of *covenant* lies upon the other modern covenants in a deed, yet that of *general warranty* stands upon the same ground as the ancient warranty, and that the only remedy for a breach thereof is the *voucher warrantia chartæ*, (see sec. 20.) But it was decided that, even by the ancient English law, an action of covenant would lie where the party might, at his election, have the other remedies; and the reason why the former remedy was rarely resorted to was, that the others furnished a more immediate and perfect satisfaction. In Massachusetts, Parsons, Ch. J., took the same view of the subject.(5)

33. But in Virginia, Green, J., says, there is no case in England where any personal remedy has been allowed upon a mere real warranty.(c) He was further of opinion, that the statute of 1734, abolishing

(1) Co. Lit. 365 a; 2 Inst. 291.

(2) 1 N. C. Rev. St. 260; 4 Kent, 469; 1 Sumn. 258-63.

(3) Touch. 201; Lit. 748; Bowman v. Whittemore, 1 Mass. 244*.

(4) 1 N. Y. Rev. St. 739; Carpenter v.

Schermerhorn, 2 Barb. Ch. 314; Stearns, 135-6; Marston v. Hobbs, 2 Mass. 437. See Anth. Shep. 475; Conn. St. 348-9; N. J. L. 462; Urquhart v. Clarke, 2 Rand. 549. (5) Chapman v. Holmes, 5 Halst. 20.

* In this case, Sedgwick, J., doubted whether a covenant running with the land can be released so as to bind a future assignee. 1 Mass. 245.

(a) A, being tenant by the curtesy, sold land belonging to his wife, by deed of bargain and sale, in fee, with general warranty. Held, the right of the heir of the wife to the land was not rebutted by the warranty. Johnson v. Bradley, 9 Ired. 362.

(b) It is said (4 Kent, 468, n.) the covenant real, together with almost all other real actions, was abolished in England by St. 3 & 4 Wm. IV, ch. 27.

(c) The court in New York have intimated that no such remedy was allowed. Townsend v. Morris, 6 Cow. 123.

voucher, did not affect the ancient remedy upon a *real warranty*, and doubted whether the personal action of covenant will lie upon such warranty, except in case of eviction by a less than freehold title, a covenant binding executors, embracing personal property, or adding the word *defend to warrant*, which would constitute a covenant for quiet enjoyment. On the other hand, Coulter, J., doubts whether the old remedy of *warrantia chartæ* may still be brought in Virginia, *voucher* being abolished.(1)(a)

34. In Kentucky, a warranty by the ancestor binds the heir to the extent of his assets by descent. And, to the same extent, the action of the heir is barred for the land warranted.(b) In North Carolina, if the deceased had an estate of inheritance in possession, and bound himself and his heirs by a general warranty, the heirs are bound with or without assets, and whether the warranty be lineal or collateral. In Tennessee, if executors, having authority to convey lands, sell with warranty; the devisees of such lands are bound by the warranty, and estopped to assert an outstanding title.(2)

CHAPTER LXXXVI.

TITLE BY DEED. COVENANTS.

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| <ul style="list-style-type: none"> 1. Covenant, general nature of. 2. May bind a grantee by <i>deed-poll</i>. 4. By what words created. 15. Covenants, <i>express</i> or <i>implied</i>. 28. <i>Joint</i> or <i>several</i>. 36. For the benefit of third persons. 37. <i>Real</i> or <i>personal</i>. 48. Covenant real, binds and passes to assignees, &c. 55. <i>Assignment</i> and <i>underlease</i>; covenants, how affected by the distinction. 57. <i>Collateral</i> covenants, not assignable. | <ul style="list-style-type: none"> 59. Successive covenants in modern deeds; seizin and right to convey. 71. For quiet enjoyment, &c.; to what eviction it extends. 80. Against incumbrances. 84. For <i>further assurance</i>. 86. Covenants in mortgages. 87. Mutual effect of covenants upon each other. 94. Special and qualified covenants. 101. <i>Further assurance</i>, when equity compels. 103. Covenant for production of title deeds. 105. For renewal of lease. |
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1. A *covenant* is an agreement or obligation, by deed, to do or abstain from some act. It is said, a covenant differs from a defeasance, in that

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| <ul style="list-style-type: none"> (1) <i>Stout v. Jackson</i>, 2 Rand. 141, 148, 156; <i>Tabb v. Binford</i>, 4 Leigh, 132. (2) <i>Logan v. Moore</i>, 1 Dana, 58; <i>Flynn v.</i> | <ul style="list-style-type: none"> <i>Williams</i>, 1 Ired. 509; <i>Robertson v. Gaines</i>, 2 Humph. 367. |
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(a) It is said, heirs are bound by warranties, if they have assets; otherwise, not. 2 Tuck. Bl. 303, n. 8; 2 Lom. 247. Where a trustee conveyed the land with collateral warranty; held, the *cestuis que trust*, who took other estate by devise or bequest from the trustee, were not precluded, after his death, from asserting their equitable rights against his estate, by his collateral warranty in the deed of conveyance; and that the act, 1 Rev. Code, c. 99, sec. 21, p. 368, applies to cases of real assets descending from the warranting ancestor, and not to personal assets, or to assets, whether real or personal, accruing from him by devise or bequest. *Norman v. Cunningham*, 5 Gratt. 63.

(b) Where one dies, having contracted to sell with warranty, the contract is fulfilled by a conveyance from the heirs with a warranty to the extent of their assets. The administrator need not join. *Gates v. McWilliams*, 6 Dana, 42. Upon the warranty of a father, the heirs of the mother are not liable, by reason of lands descended from the mother. *Hart v. Thompson*, 3 B. Monr. 485.

the latter provides for its own execution, or terminates in itself, while a covenant is something to be performed by the party covenanting. But a covenant may engage that something has been already done. And a covenant of this description may, in certain cases, operate *prospectively*. Thus, if an officer, selling real estate on execution, covenants that his proceedings have been according to law, a subsequent neglect to return the execution is a breach of such covenant.(1)

2. It is said, a covenant may arise by deed-poll, because the covenantee's acceptance of the deed binds him as party to the agreement. So, where two convey by indenture, and one only seals it, yet, if the other enters, and otherwise assents, he is bound by the covenants. So one taking by way of remainder, who is no party to the deed, if he enters, is bound by the covenants.(2) (See ch. 83, sec. 12, n.)

3. A lease, by letters patent from the Crown, provided thus—"and the said A (lessee,) shall repair," &c. A accepts the lease. Held, these words bound him by a covenant.(3)

4. A covenant may be created by any form of words, which shows the intent of the parties. Thus, the words "it is hereby agreed" create a covenant. And, in construing a covenant, the whole instrument is to be taken into consideration.(4)

5. Lease for years, *on condition* the lessee acquit the lessor of ordinary and extraordinary charges, and keep and leave the houses in as good plight as he found them. Held, a covenant.(5)

6. If a lessee covenants to repair, provided always, *and it is agreed*, that the lessor shall find timber, this is a covenant by the lessor, not a mere qualification of the lessee's covenant. Otherwise, if the clause *and it is agreed* were omitted.(6)

7. A lessor covenants that the lessee may sell coals, *he paying and accounting therefor*. This is a covenant by the lessee.(7)

8. A agreed to sell land to B, for a sum to be paid, one-third annually from the date of the agreement, with annual interest. In an action by B against A, held, it could not be sustained, without proving a demand for a deed, and tender of security for the price.(8)

9. A covenant, to be performed *without limitation of time*, cannot be a condition precedent to another covenant.(9)

10. Lease of a quarry, in consideration that the lessee pay a certain price per perch for all stone taken therefrom. This is a contract by the lessee to work the quarry, upon which covenant lies.(10)

11. Purchase of land by a sealed agreement, "subject to payment of the purchase-money, and interest due," to a third person. This is a

(1) Plow. 138; Pomfret v. Ricroft, Vent. 26; Touch. 162; Wade v. Merriam, 11 Pick. 280.

(2) 1 Rolle's Abr. 517; Lit. 375; Green v. Horne, 1 Salk. 197; Kimpton v. Walker, 9 Verm. 191; Newell v. Hill, 2 Met. 180. See Cleves v. Willoughby, 7 Hill, 83.

(3) Bret v. Cumberland, Cro. Jac. 399.

(4) Fairfax v. Lewis, 2 Rand. 20; 2 Bibb, 614; Wolveridge v. Steward, 3 M. & Scott, 561; Bull v. Follett, 5 Cow. 170; Marvin v. Stone, 2, 781; Campbell v. Shrum, 3 Watts, 63; Chapman v. Holmes, 5 Halst. 32; Hollis v. Carr, 2 Mod. 86; Ib. 268. See 5 Gill

& J. 239; Finley v. Boehme, 3, 42; McCullough v. Cox, 6 Barb. 386; Houston v. Spruance, 4 Harring. 117; Midgett v. Brooks, 12 Ired. 145; Lovering v. Lovering, 13 N. H. 513; Killian v. Harshaw, 7 Ired. 497; Yocum v. Barnes, 8 B. Mon. 496.

(5) Bro. Abr. Cov. pl. 4; 4 Bibb, 314. See Johnson v. Valentine, 4 Sandf. 36.

(6) Holder v. Taylor, 1 Rolle's Abr. 518.

(7) Northumberland v. Errington, 5 T. R. 522.

(8) Fairbanks v. Dow, 6 N. H. 266.

(9) Barksdale v. Toomer, 2 Bai. 180.

(10) Watson v. O'Hern, 6 Watts, 362.

covenant by the vendee to pay the money, and the vendor may sue for the benefit of the third person.(1)

11 *a.* In a lease, it was stated that the lessor "let and leased" two acres of land, &c., "and as much firewood as she wants off the hundred acres, a part of which she has conveyed to me, and oxen to haul it, and do all her other ox-work." Held, these words made an express covenant, that the lessee should have as much firewood as she should desire, from the land referred to, and that the lessor would provide oxen to haul it.(2)

11 *b.* "Said lessee doth agree to deliver up, &c., by said lessor paying him \$250," is a covenant, not a condition or limitation.(3)

11 *c.* Where a deed, after describing the premises by metes and bounds, contained these words: "containing 195 acres of land," and, after excepting two pieces, one of fifty and another of sixteen acres, added, "there being in the lot hereby conveyed 135 acres, strict measure, the surplus; if any, not being hereby conveyed;" held, this was not a covenant that there were 135 acres.(4)

12. Where land incumbered is sold, expressly subject to the incumbrance, as between the grantor and the grantee, this is an assumption of the debt by the latter. Otherwise, where there is no express or implied promise to pay it. Thus, where a conveyance was made to creditors, in consideration of a release from them, the grantor having an interest in the surplus remaining after the debts were paid, and he discharged a mortgage upon the land; held, he had no claim upon the grantees for reimbursement.(5)

13. A lessee covenants that he will plough, &c., the land, *except the rabbit-warren*, &c. Held, he was liable in covenant for ploughing the rabbit-warren.(6)

14. A assigns a lease in consideration of £12, the assignment to be void on payment of that sum by a certain day. If not paid, the assignee to sell the lease and pay himself £12. Held, no covenant by the assignee.(7)(*a*)

15. Covenants are either *express* or *implied*. The word *grant* has been sometimes thought to make an implied warranty; but a contrary doctrine is now generally adopted. And the effect of the word will be controlled by any express covenants in the deed. Chancellor Kent says, the grant of a water-course implies a covenant by the grantor not to disturb the grantee in the enjoyment of it.(8)

16. The word "*concessi*" or "*feoffavi*" implies a warranty, in a lease, and the former word in the assignment of a lease;(b) but not in the

(1) *Campbell v. Shrum*, 3 Watts, 60.

(2) *Lovering v. Lovering*, 13 N. H. 513.

(3) *Wheeler v. Dascomb*, 3 Cush. 285.

(4) *Roat v. Puff*, 3 Barb. 353.

(5) *Blank v. German*, 5 Watts & S. 36.

(6) *St. Albans v. Ellis*, 16 E. 252.

(7) *Salisbury v. Philips*, 10 John. 57.

(8) Co. Lit. 384 a, n. 1; *Vanderkarr v. Vanderkarr*, 11 John. 122; 4 Kent, 473.

(a) It has been seen (Vol. I, *Mortgage*,) that, in general, the condition of a mortgage cannot be taken as a covenant to pay the money. (See *Drummond v. Richards*, 2 Munt. 337.) In Kentucky, it has been held, that an obligation to pay money, with a condition that it may be discharged by conveying certain land, is a covenant to convey the land. *Kennedy v. Kennedy*, 2 Bibb, 465.

(b) *Assumpsit* will not lie, in such case, for indemnity, even though there were a subsequent promise. 9 Ad. & Ell. 532.

conveyance of a fee. So the word *demise* in a lease implies a covenant for title and quiet enjoyment.(1)

17. In Pennsylvania, under the act of 1715, the words *grant, bargain and sell*, do not create a general warranty, but only a covenant against the acts of the grantor himself. The act applies to *articles of agreement*. The words in question make a covenant of seizin as well as warranty, which is broken by any incumbrance created by the grantor himself; as, for instance, previous articles of agreement.(2)

18. In New York, *bargain, sell, aliene and confirm* never create an implied warranty. The word *give* has been held to amount to an implied warranty during the life of the feoffor.(3) But, by the Revised Statutes, no covenants shall be implied in a conveyance, whether it contains special covenants or not.(4) This applies to the words *grant and demise* in a lease. In North Carolina, the words "give, grant, bargain, sell," &c., have been denied to imply any warranty of title; and it is held that there are no implied warranties in a deed of land.(5)

19. In Mississippi, Illinois, Indiana, Arkansas, Alabama,(a) and Delaware, it is said, the words *grant, bargain and sell*, in a conveyance of the fee, make an *express* covenant of an indefeasible estate in fee, against incumbrances by the grantor, (except rents and services that may be reserved,) and for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words (in Mississippi).(b) The provision does not apply to leases at rack-rent, or not exceeding twenty-one years, where possession goes with the lease.(6)

20. These words create the same covenant in Missouri, and also a covenant for further assurance.(7)

21. In Maryland and Alabama, whether the word *dedi* imports a warranty, is questioned as a doubtful point. But it has no such operation, in a deed which only purports to pass the rights of the parties, and not the land itself. In Ohio, the word *give*, in the conveyance of

(1) *Frost v. Raymond*, 2 Caines, 188; *Baker v. Harris*, 1 Per. & Dav. 360; 9 Ad. & Ell. 532; *Line v. Stephenson*, 5 Bing. N. C. 183; *Crouch v. Fowle*, 9 N. H. 222.

(2) *Gratz v. Ewalt*, 2 Binn. 95; *Seitzinger v. Weaver*, 1 Rawle, 377.

(3) *Frost v. Raymond*, 2 Caines, 188; *Kent v. Welch*, 7 John. 258; *Grannis v. Clark*, 8 Cow. 36.

(4) 1 N. Y. Rev. St. 738; *Kinney v. Watts*, 14 Wend. 38.

(5) *Rickets v. Dickens*, 1 Mur. 343; *Ib.* 348; *Huntly v. Waddell*, 12 Ired. 32.

(6) 4 Kent, 473-4; *Missi. Rev. C.* 459-60; *Illin. Rev. L.* 510; *Ark. Rev. St.* 188; *Roebuck v. Duprey*, 2 Ala. (N. S.) 535.

(7) *Misso. St.* 119-20.

(a) Chancellor Kent says, (4 Comm. 473,) it is so declared *by statute* in these States. But he afterwards remarks, (Ib. 474,) that in Alabama, these words do not imply any warranty of title. Such seems to be the law, as settled in the case of *Roebuck v. Duprey*, 2 Ala. R. (N. S.) 535. It has been recently held, that the words "grant, bargain, sell," are all necessary in a deed, to create the statute covenant, that the grantor was seized of an indefeasible estate in fee-simple, &c., and for quiet enjoyment. *Claunich v. Allen*, 12 Ala. 159. And where a vendor sells land by a deed containing the words "grant, bargain, sell," and also a covenant of general warranty, which is at the time incumbered by a mortgage, executed by the vendor; the covenant implied by the statute, from the use of these words, is broken as soon as the covenant is made, and the express warranty, when the vendee is evicted by the mortgagee. *Andrews v. McCoy*, 8 Ala. 920.

The statutory covenant, raised by the words "grant, bargain, and sell," in Iowa, cannot be restrained by implication, but only by express words. *Brown v. Tomlinson*, 2 Greene, (Iowa,) 525.

(b) Thus by an express covenant of *warranty*. *Weems v. McCaughan*, 7 S. & M. 422. This excludes an implied covenant of *seizin*. *Hoy v. Taliaferro*, 8 S. & M. 727; *Duncan v. Lane*, Ib. 744; *Witty v. Hightower*, 12 S. & M. 478.

a freehold estate, implies a warranty for the grantor's life.(1) In Maine, this word, used in a bargain and sale, was formerly held not to make an implied covenant; nor will the deed be construed a feoffment, in order to give it this effect. (Whether even in a feoffment it would make a covenant, *dubitat*.) But, in a later case, a contrary rule is established.(2)

22. In Indiana, grants noted on recorded town plats operate, by virtue of a statute, as general warranty conveyances to the town, to individuals, or to the public, according to the intention of the grantor.(3)

23. In Kentucky, the common law doctrine, as to the implied covenant arising from the word *dedi*, seems to be recognized.(4)

24. In Massachusetts it is said, there may be implied covenants in a deed, consistent with, but not contradictory to, the express covenants.(5)

25. Express covenants are said to be construed more strictly than those which are implied. The former may be entered into without consideration.(6)

26. Where a deed contains both an implied and express covenant, the latter qualifies and restrains the former. Thus the implied covenant in a lease, against any lawful eviction, created by the words *grant and demise*, is restricted, by an express covenant against eviction *by the lessor or any claiming under him*, to the disturbance described in the latter clause.(7)(a)

27. It has been doubted, whether the words, in a lease, "yielding and paying" a certain rent, constitute an express or implied covenant. In Vermont, upon a full examination of the contradictory authorities, the covenant was held to be an implied one, and not to bind the lessee after assignment of the lease.(8)

28. A covenant made by several parties may be either joint, several, or both joint and several. Thus, if the parties bind themselves *and every of them*, the covenantee may treat the covenant as joint or several at his election. And, in some cases, a covenant in terms joint may be so treated. But only at the election of the covenantee, it seems.(9)(b)

(1) *Deakins v. Hollis*, 7 Gill & J. 311; 2 Alab. (N. S.) 535; *Young v. Hargrave*, 7 Ohio, 63.

(2) *Allen v. Sayward*, 5 Greenl. 227; *Crouch v. Fowle*, 9 Shepl. 219.

(3) *Conner v. President, &c.*, 1 Blac. 44.

(4) 1 Pitt. Dig. 211.

(5) *Gates v. Caldwell*, 7 Mass. 68; acc. *Roebuck v. Dupree*, 2 Alab. (N. S.) 535.

(6) *Stubrick v. Salmond*, 3 Burr, 1639.

(7) *Merrill v. Frame*, 4 Taun. 329; *Barney v. Keith*, 4 Wend. 502; *Noke's case*, 4 Rep.

80 b; *Gates v. Caldwell*, 7 Mass. 68; *Deering v. Farrington*, 1 Mod. 113. But see 2 Brownl. 214; *Clarke v. Samson*, 1 Ves. 101.

(8) *Kimpton v. Walker*, 9 Verm. 191.

(9) See *Hollingsworth v. Dunbar*, 3 Munf. 168; *Cabell v. Vaughan*, 1 Saun. 288; *Ernst v. Bartle*, 1 John. Cas. 319; *Grier v. Fletcher*, 1 Ired. 417; *Pride v. Boyce*, Rice, 275; *Foley v. Addenbrooke*, 4 Ad. & El. (N. S.) 197; *St. Clair v. Williams*, 7 Ohio, 110; *Carter v. James*, 12 Mees. & W. 148; *Haskins v. Lombard*, 4 Shepl. 140.

(a) In Pennsylvania, it is held, that an express covenant does not prevent an implied one also. *Watson v. O'Hern*, 6 Watts, 369.

(b) In Alabama, a joint covenant operates jointly and severally. Clay's Dig. 323. So in Arkansas,—Rev. St. 475; and New Hampshire,—Rev. St. 321. If A and B, tenants in common, convey to C with a covenant against incumbrances, A having previously mortgaged his share, and C redeem; C may maintain an action against A and B jointly. *Comings v. Little*, 24 Pick. 266. The liability of heirs upon the warranty of their ancestor is *joint*. *House v. Mitchell*, Meigs, 138.

An indenture "between A and B of the first part, and C of the second part," whereby

29. On the other hand, a covenant may be made to or with several persons. And the construction of it as joint or several will depend less upon the words than upon the nature of the property. Thus, if one convey land to A and B, and covenant for the title with them *and every of them*, the last words are void, and the covenant is joint. But, if by the same deed one convey Black acre to A and White acre to B, and covenant for the title of the whole with them and each of them, the covenant is several. So where parties grant their several interests in the same estate. The construction in the former case is adopted, because a different one would subject the party to two actions, and the Court would be in doubt for whom to give judgment. If the express words of a joint covenant are used, it will be construed as joint, though the covenantees have several interests.(1)

30. Tenants in common are regarded in law as having several interests. Hence, though claiming under one deed, they need not join in an action upon the warranty in such deed.(2)(a)

31. Where lessees, at the commencement of the lease, covenant jointly and severally, they are bound in the same way by a subsequent covenant, joint in form, though an agreement on the part of the lessor intervenes.

32. In a lease from A to B and C, B and C jointly and severally enter into a series of covenants. Then succeeded a clause, as follows:—it is declared by and between the parties, and A hereby covenants, that B and C may sell coals, *they, the said B and C, paying and accounting therefor*. Held, the last words made a joint and several covenant by B and C.(3)

33. A lease recited, that L agreed to take the land from C, and that it had been agreed that R should covenant for the rent. In consideration of the *covenants* afternamed on the part of L to be performed, particularly of R's covenant, C, at R's request, demised to L. L and R covenanted to pay rent, and *further* that L should repair. Other covenants followed, similar to the last; and a right of re-entry was given, if L should not perform his covenants. Held, the covenant to repair bound R as well as L.(4)

(1) Trustees, &c. v. Letcher, 1 Monr. 13; Slingsby's case, 5 Rep. 18; Jenk. 262; Ludlow v. McCrea, 1 Wend. 228; Eccleston v. Clipsham, 1 Saun. 153; Johnson v. Wilson, Willes, 248; Withers v. Bircham, 3 Barn. & C. 254; James v. Emery, 5 Price, 529; Sorsbie v. Park, 12 Mees. & W. 146. See Burrett v. Pratt, 22 Pick. 556, for a similar rule relating to mortgages. Evans v. Sanders, 10

B. Mon. 291; Jewett v. Cunard, 3 W. & M. 277.

(2) Swett v. Patrick, 2 Fairf. 179. (See, as to joint and several covenants, Ernst v. Bartle, 1 John. Cas. 319; Ludlow v. McCrea, 1 Wend. 231; Halsey v. Whitney, 4 Mas. 226; 1 Wheat. Sel. 388.)

(3) Northumberland v. Errington, 5 T. R. 522.

(4) Copland v. Laporte, 3 Ad. & Ell. 517.

"the party of the first part" covenanted to do certain work for "the party of the second part," for which the latter covenanted to pay "the party of the first part" certain sums of money, did not mention the parties by name, in the body of the instrument, and was executed by A and C only. Held, that on breach of C's covenants, A might maintain an action of covenant against him, without joining B as a plaintiff. Philadelphia, &c. v. Howard, 13 How. 30.

(a) It has been held in Ohio, that where a covenantee dies, before partition, one heir cannot sue alone upon the covenants. Tapscot v. Williams, 10 Ohio, 442. In the same State, where several lots are conveyed, and afterwards severally assigned, each assignee, it seems, may sue on the warranty. St. Clair v. Williams, 7, 110.

34. Where two grantors covenant against incumbrances suffered *by them*, this may include *several* incumbrances.(1)

35. Where a covenant which runs with the land is divisible, and the land passes by assignment to several persons, in divided portions, the covenant attaches to each portion *pro tanto*. And each owner is liable proportionally for any charge upon the whole land, or exclusively for a charge upon his own parcel.(2)

36. Where covenants are made by and between two or more parties, though for the benefit of a third person, who is named, an action upon such covenants can be brought only by one of the parties. Thus, a covenant with the *rector, wardens and vestry* of a church to pay rent to the rector or wardens, must be sued by the former parties, not the latter. So where the reversion of lands demised is conveyed to A and B in trust for A, they must join in suing a covenant to repair.(3)

37. Covenants are *real* or *personal*. It is said, covenants real are those which have for their object something annexed to, or inherent in, or connected with real property. Such covenants are *quodam modo* annexed and appurtenant to the land itself. It is of course otherwise with covenants relating to a thing not in *esse* at the time of the conveyance. But a covenant to repair or rebuild the property conveyed belongs to the former, and not to the latter class. Thus, where one grants a watercourse, and covenants to cleanse it, this is a real covenant. So a covenant to live on the land; although assigns are not named. So a covenant to effect insurance, and apply the proceeds, in case of loss by fire, to repairing the property.(4)(a)

38. A covenant in the grant of a rent-charge, to pay it without deduction, is not a personal, but a real covenant, being in the nature of a grant, or at least a declaration accompanying, and showing the mode of operation of the grant.(5)

39. Lease by A to B. B covenants to surrender the land at the end of the term, with the buildings and improvements, upon A's paying him for new erections. The parties also agreed that B might remove the old, and erect new buildings, and that A should pay him for such buildings and improvements, not exceeding in value a certain sum. Held, A was bound to pay for *additions to*, and *alterations in*, the old buildings, though not for ordinary repairs—as roofing or raising new chimneys;

(1) Duvall v. Craig, 2 Wheat. 45; Carleton v. Tyler, 4 Shepl. 392.

(2) Astor v. Miller, 2 Paige, 68. (See Armstrong v. Wheeler, 9 Cow. 88.)

(3) Montague v. Smith, 13 Mass. 396; Scott v. Godwin, 1 B. & P. 67; Yelv. 177, n. 1; Fisher v. Ellis, 3 Pick. 322; Dutton v. Pool, T. Raym. 302; Spencer v. Field, 10 Wend. 87.

(4) 4 Cruise, 308; Co. Lit. 384 b; Jenk. 241; Spencer's case, 5 Rep. 16; Holmes v. Buckley, 1 Abr. Eq. 27; Tatem v. Chapland, 2 H. Bl. 133; Thomas v. Vonkapff, 6 Gill &

J. 372; Vernon v. Smith, 5 B. & A. 1. See Norman v. Wells, 17 Wend. 136; Innes v. Agrew, 1 Ohio, 386; Wooton v. Steffenoni, 12 Mees. & W. 129; Simpson v. Clayton, 6 Scott, 469; Bristow v. Wood, 1 Coll. 480; Tallman v. Coffin, 4 Comst. 134; Fowler v. Poling, 6 Barb. 165; Savage v. Mason, 3 Cush. 500.

(5) Brewster v. Kitchin, 1 Ld. Raym. 317; Brewster v. Kidgill, 12 Mod. 171; Bally v. Wells, 3 Wils. 35; Tatem v. Chaplin, 2 H. Bl. 133.

(a) See Walsh v. Fussell, 6 Bing. 163; Milnes v. Branch, 5 M. & S. 411; Vyvyan v. Arthur, 1 B. & C. 410; Portmore v. Bunn, 694; Sampson v. Easterby, 9 Ib. 505; Gray v. Cuthbertson, 2 Chit. R. 482; Collins v. Plumb, 16 Ves. 454. Otherwise with a covenant not to permit certain persons to work on the land. Mayor v. Patterson, 10 E. 130.

and that the covenant of A ran with the land, so as to render him liable to a suit by the executor of an assignee of B.(1)

40. But, where a lessor covenants to pay the lessee the value of the improvements, which shall be left by the latter upon the premises, this covenant does not run with the land, or bind an assignee of the reversion.(2)

41. A covenant by a grantee, not to build upon a common or public square belonging to the grantor in front of the land, passes to an assignee of the grantee.(3)

42. A covenant, which is indefinite as to its subject matter, does not pass with the land. Thus, a lease was given of a theatre, the lessee agreeing to pay a certain sum of money, till which payment, the lessor to have the use of two boxes, one in the dress, the other in the lower circle, not designating them. Held, an assignee of the lessee was not bound by this agreement.(4)

43. The covenant of a lessee, that he will always occupy the premises, binds an assignee. So a covenant by the lessor, to furnish a supply of water, may be sued upon by an assignee of the lessee.(5) So a covenant for quiet enjoyment, in a lease, being *in futuro*, runs with the land, and passes to an assignee.(6) So a covenant by the lessee, to pay all costs, charges, &c., except taxes, runs with the land, and binds an assignee.(7) So a covenant to pay assessments.(8)

44. A covenant not to hire persons of a certain description to work in a mill, which is leased, does not run with the land.(9)

45. A conveyance of the privilege of drawing water from a pond, is not a conveyance of *land*. Hence, a covenant connected with it is not assignable.(10)(a)

46. A grant by a mortgagor of his right of redemption, with the usual covenants, is so far a conveyance of the land, that the covenants real are annexed to it, and pass with it to the grantee and his assigns; as, for instance, to an execution purchaser of his estate.(11)

47. Conveyance, on condition the grantee give bond to maintain a

(1) *Lametti v. Anderson*, 6 Cow. 302.

(2) *Bream v. Dickerson*, 2 Humph. 116.
See *Copeland v. Woods*, Ib. 330.

(3) *Trustees, &c. v. Cowen*, 4 Paige, 510.

(4) *Flight v. Glossop*, 2 Scott, 220; *Flight v. Glossop*, 2 Bing. N. R. 125.

(5) *Tatem v. Chaplin*, 2 H. Bl. 133; *Jourdain v. Wilson*, 4 B. & A. 266.

(6) *Shelton v. Codman*, 3 Cush. 318.

(7) *Torrey v. Wallis*, 3 Cush. 442.

(8) *Kearney v. Post*, 1 Sandf. 105.

(9) *Congleton v. Pattison*, 10 E. 130.

(10) *Wheelock v. Thayer*, 16 Pick. 68.

(11) *White v. Whitney*, 3 Met. 81.

(a) A conveyed to B a lot of land, including a part of his mill-pond, with a right of ingress and egress to and from any part of the land and water described, to dig and carry away the soil. B having conveyed to C, A and C entered into an agreement, by which A (not naming heirs, &c.) covenanted, upon C's request, to draw off his pond six days in each year, in August and September, to enable C to dig and carry out mud. A died, and his estate in the mill-pond passed to D and E, against whom C brings an action upon the covenant. Held, there was a privity of estate between the parties, and the covenant ran with the land. *Morse v. Aldrich*, 19 Pick. 449.

The several owners of mills, drawing water from one stream by means of one dam, entered into an indenture, by which, for themselves, their heirs, administrators and assigns respectively, they covenanted with each other, and their respective heirs, administrators and assigns, that they would erect and use wheels of a certain construction and limited power, in their respective mills. Held, there was no privity of estate between the parties, and, therefore, the covenant did not run with the land and bind a grantee of one of the mills. *Hurd v. Curtis*, *Ibid.* 459.

certain highway upon the land, but reserving no right of entry for a breach. The grantee gives a bond, binding his executors, &c., and assigns, and afterwards conveys the land. The grantor brings an action against the assignee, as upon a covenant running with the land. Held, the action could not be sustained; for, by giving the bond, the grantee became absolute owner of the land.(1)

48. A covenant real, as has been seen, passes with the land to heirs or assignees, and binds them as well as the original covenantor.(a) It is said to *run with the land*. So also the benefit of such covenant passes to the heir or assignee of the covenantee, though not expressly named. Thus, where a lessee for years covenants with the lessor, his *executors and administrators*, to repair; the heir of the lessor may maintain an action upon such covenant. Otherwise, where the lessor is only a tenant for life. So the assignee of a grantee or lessee may maintain an action upon such covenant against the grantor or lessor; as, for instance, upon the implied covenant arising from the words *grant and demise*.(2)(b)

49. A covenant or stipulation, that a grantee shall maintain a partition fence between the land granted and other land of the grantor, runs with the land, and binds an assignee.(3)

50. Equity will enforce a covenant real in favor of an assignee of the covenantee, against an assignee of the covenantor. Thus, A granted a water-course through his land to B and his heirs, covenanting for himself, his heirs and assigns, to cleanse it. A transferred the land to C, and B the water-course to D. B and D for forty years cleansed the latter themselves. C raised and built upon the land, and thereby rendered the cleansing much more difficult. D brings a bill in equity against C, to enforce the covenant. Held, C was bound by it, notwithstanding the acts of B and D, which were done while the labor was comparatively small.(4)

51. The principle, that covenants pass to the assignee, not only enables him, but disables the assignor, to maintain an action thereupon. Thus a lessor, after granting over his reversion, cannot sue for rent accruing subsequently to the assignment. But a lessor may sue upon a covenant to repair, though he has given bond to convey the land. And, it is said, an assignor cannot sue upon covenants broken after assignment, unless he is himself bound to indemnify the assignee for any breach by the feoffor or lessor.(5) (See ch. 87, sec. 40.)

(1) *Inhab'ts, &c. v. Carver*, 16 Pick. 183.

(2) *Spencer's case*, 5 Rep. 16; *Lougher v. Williams*, 2 Lev. 92; *Brudnell v. Roberts*, 2 Wils. 143; 5 Rep. 17 a; *Norman v. Wells*, 17 Wend. 136; *Brown v. Staples*, 28 Maine, 497.

(3) *Kellogg v. Robinson*, 6 Verm. 276.

(4) *Holmes v. Buckley*, 1 Abr. Eq. 27.

(5) *Walker's case*, 3 Co. 22; 1 Bibb, 288; *Bickford v. Page*, 2 Mass. 460.

(a) A covenant for quiet enjoyment passes by a quit-claim deed of the land. *Hunt v. Amidon*, 4 Hill, 345. Whether a covenant which runs with the land can be *released*, so as to bind subsequent purchasers;—see *Chase v. Weston*, 12 N. H. 413; *Littlefield v. Getchell*, 32 Maine, 390; *Crooker v. Jewell*, 29 Maine, 527.

(b) The provisions of Statute, Henry VIII, ch. 34, sec. 2, upon this subject, have been already referred to. (Vol. I, *Estate for years*.) It is said, to make a covenant run with the land, there must be a subsisting privity of estate between the parties. 3 T. R. 402; *Paul v. Nurse*, 8 Barn. & Cr. 486. A lessee's covenant to pay assessments runs with the land, and binds the assignee of the term. *Post v. Kearney*, 2 Comst. 394.

52. An assignee is liable only for covenants broken while he holds the land; not after he has re-assigned; as where he re-assigns before the rent is due. But he is liable for a breach in his own time, though the suit be not commenced till after re-assignment.(1)

53. A lessee assigned, *subject to the payment of rent*, performance of covenants, &c. The assignee re-assigned, and the lessee afterwards paid rent. Held, his assignee was not liable to him in covenant. But where A, lessee for 1690 years, assigned to B for 1600 years, reserving a rent, and B assigned to the defendant, who covenanted to perform all the covenants of B to A, and the defendant assigned to D, whom B accepted as his tenant; held, B might still sue the defendant, by *privity of contract*, for rent unpaid A, without proving that he, B, had paid it, or been injured by the non-payment.(2)

54. A lessee covenants not to assign. He assigns the lease, and the assignee re-assigns to the lessor. Held, the latter might still sue upon the covenant.(3)

55. The distinction between an assignee and an under-lessee, and their respective liabilities, has been already pointed out, (Vol. I, *Estate for years*.) As recently as the time of Lord Mansfield, this distinction seems to have been not perfectly settled. In the case of *Holford v. Hatch*, which was covenant for rent by the lessor against a sub-tenant, it was argued that the latter was in law an assignee, as much as a devisee, executor, execution purchaser, &c., a transfer to whom was no forfeiture; that, claiming under the first lease, the defendant was bound by a covenant which runs with the land; and that the lessor had an equitable claim against whoever was in possession. The Court (Lord Mansfield, Ch. J.) had great doubts, and looked fully into the books; but finally gave judgment for the defendant.(4)

56. Where a lessee assigns his whole interest, though reserving rent to himself, and not to the lessor, and though the covenants in the lease differ from those in the assignment; the assignee may still recover against the lessor upon his covenants; as, for instance, upon a covenant to find timber for repairs.(5)

57. Statute 32 Henry VIII, c. 34, giving to the assignee of a reversion a claim upon the covenants in the original deed, does not transfer the privity of contract, but only annexes to the reversion the covenants relating to the land. Hence its operation does not extend to mere *collateral engagements*.(6)

58. It is said, if a mortgagor and mortgagee join in making a lease, and the lessee covenants to pay rent and repair with the mortgagor and his assigns only, the covenants do not pass to an assignee of the mortgagor, being collateral to the mortgagor's estate.(7)

59. The single general warranty, formerly practiced, has, in modern deeds, given place to a series of distinct covenants. The two first of these, are a covenant that the grantor is lawfully seized in fee-simple,

(1) *Lekeux v. Nash*, Str. 1221; *Armstrong v. Wheeler*, 9 Cow. 88; *Harley v. King*, 2 Crompt. Mees. & R. 18; *Paul v. Nurse*, 8 Barn. & Cr. 486.

(2) *Wolveridge v. Steward*, 3 M. & Scott, 561; *Port v. Jackson*, 17 Johns. 239, 479.

(3) *Hazlehurst v. Kendrick*, 6 S. & R. 446.

(4) *Holford v. Hatch*, Doug. 182; *Brewer v. Hill*, 2 Anst. 413.

(5) *Palmer v. Edwards*, Doug. 186, n.

(6) *Thursby v. Plant*, 1 Saun. 237.

(7) *Webb v. Russell*, 3 T. R. 393; *Russell v. Stokes*, 1 H. Bl. 662.

and a covenant that he has good right and full power to convey.(a) These have usually been regarded as parts of one covenant;(1) but incorrectly, it is said, because, although seizin in fee implies and involves the right to convey, the latter does not necessarily imply the former. Thus, a *power* to convey satisfies the latter covenant, though not the former.(2)

60. Seizin in fact, or actual possession, at the time of making the covenant of seizin, is held sufficient to sustain it.(b) But possession without claim of title is not.

61. The covenant of seizin is broken, if the covenantor have not the possession, the right of possession, and the right of legal title; or the very estate in quantity and quality, which the deed purports to convey. He must have *the whole title*. But not by any outstanding equity, or equitable lien, as, for instance, a mortgage or judgment, or the expectant right of a wife to dower, living her husband.(3) Nor where the grantor has had exclusive occupation, by his tenant, under a claim of title, for thirty-one years.(4) Otherwise, if the grantor do not own such things, affixed to the freehold, as would pass by a conveyance of the land. Thus, where a grantor covenanted that he was lawful owner of the premises, and seized of a good and indefeasible inheritance therein; and a rail-fence on the premises was the property of another person, by virtue of a previous agreement with the grantor; held, the grantee might maintain an action for the covenant of seizin.(5) So it is a breach of the covenant of seizin, if there is no such land in existence, as the deed purports to convey.(6)

62. Conveyance, bounded on the land of a third person, with whom the grantor had previously agreed by parol on a different line from the true one, and marked it by stakes. Held, such third person's possession between these lines, claiming title, at the time of the conveyance, was a breach of the covenant of seizin.(7)

62 *a*. But it extends only to an adverse title *in a third person*; not to one of the grantee himself, who is estopped from setting it up against the grantor.(8)

(1) Griffin v. Fairbrother, 1 Fairf. 91; Marston v. Hobbs, 2 Mass. 437; Willard v. Twitchell, 1 N. H. 177. Fairf. 389; Fitzhugh v. Crogham, 2 J. J. Marsh. 430; 1 Pirt. Dig. 225; Sedgwick v. Hollenback, 7 John. 376; 16, 254.

(2) Trenchard v. Hoskins, Winch. 91; Lit. Rep. 203; Gamsford v. Griffith, Sid. 328.

(3) Adm'r, &c. v. McCoy, 3 Ohio, 218; Pearce v. Chouteau, 13 Mis. 527; Mills v. Catlin, 22 Verm. 98; Wheeler v. Hatch, 3

(4) Ginn v. Hancock, 31 Maine, 42.

(5) Mott v. Palmer, 1 Comst. 564.

(6) Bacon v. Lincoln, 4 Cush. 210.

(7) Cornell v. Jackson, 3 Cush. 506.

(8) Furness v. Williams, 11 Illin. 229.

(a) Covenants of seizin, against eviction, and for quiet enjoyment, were introduced long after warranties, not for the purpose of greater indemnification, but to supply some defects in the warranty, of another description. Stout v. Jackson, 2 Rand. 172.

A covenant in a deed, "to warrant and defend the title of the land sold," is not a covenant of seizin, and an actual eviction or its equivalent is necessary to establish a breach. Witty v. Hightower, 12 S. & M. 478.

Where the covenantee in such case goes into possession, and purchases a supposed paramount title from a stranger, there is no breach of the covenant, and he cannot maintain an action thereon. *Ib*.

Under a covenant to convey by "a good general warranty deed, with the fee-simple annexed," a covenant of seizin is not essential. Kirkendall v. Mitchell, 3 McL. 144.

(b) In New Hampshire, a mere *right of entry*. Willard v. Twitchell, 1 N. H. 177. But see Parker v. Brown, 16 N. H. 176.

62 *b*. The covenant is broken by an outstanding life-estate, though the grantee have always had possession since the conveyance.(1)

63. Where a grantor holds under a deed which is not *void*, but only *voidable*, as, for instance, the deed of a *non compos* not under guardianship, the covenant of seizin is not broken. So where he has exclusive possession, claiming a fee adversely to the owner, this satisfies the covenants of seizin and a right to convey. So where he claims under a deed from one having no right to convey, and enters under color, though not by virtue, of such deed, and acquires a seizin by disseizin of the prior owner. But merely showing a deed from a third person is insufficient to sustain the covenant, without proving the seizin of the latter.(2)

64. It has been held to be no breach of this covenant, that the grantor owns a less number of acres than that described in the deed.(3)

65. A distinction is made between the naked covenant of *seizin*, and that of a "perfect, absolute, and indefeasible estate of inheritance in fee simple." The latter covenant is broken, where the former might not be. So, where one covenants that he has an indefeasible estate in fee simple, a tenancy by the curtesy, the tenant being in possession, is a breach.(4)

66. In Vermont, the doctrine above stated, as to the import of the covenant of seizin, has been denied. Where one covenants that he is "lawfully(*a*) seized in fee," a seizin by wrong, or of an estate less than a fee, is insufficient. It is also held, that this covenant is not the same with that of "a good right to convey." The latter is a covenant *for title*, and requires "the very estate, in quantity and quality," which is agreed for.(5)

67. So, in Connecticut, the doctrine adopted in Massachusetts is denied, and the covenant of seizin held to require a *lawful* seizin.(6)

68. The covenant of seizin has reference to the time of conveyance.(*b*) No subsequently acquired title is a fulfilment of it.

69. A conveys to B, and B, not having entered or recorded his deed, conveys to C, who records his deed. B then gives up his deed to A, and takes up the consideration notes. A then conveys, with covenants, to D, who records his deed. Held, inasmuch as D acquired a paramount title only by the *recording* of his deed, the covenant of seizin, entered into at the *making* of the deed, was broken.(7)

70. Where one covenants that he is seized in fee simple, and has only a copyhold in fee, the covenant is broken, and the measure of damages is the difference in value of a fee simple and a copyhold. So, where a husband and wife convey, and the latter is an infant and dies, it is a sufficient breach of the covenant of a right to convey, to allege this fact, and that her right has descended to a minor heir, and that the estate is divested from the plaintiff.(8)

(1) Mills v. Catlin, 22 Verm. 98.

(2) Wait v. Maxwell, 5 Pick. 217; Marston v. Hobbs, 2 Mass. 433; Bearce v. Jackson, 4, 408; Smith v. Strong, 14 Pick. 132; Baxter v. Bradbury, 7 Shepl. 260; Spring v. Chase, 9, 505.

(3) Mann v. Pearson, 2 John. 37.

(4) Smith v. Strong, 14 Pick. 132; Gar-

field v. Williams, 2 Verm. 327; Lockwood v. Sturdevant, 6 Conn. 373.

(5) Richardson v. Dorr, 5 Verm. 19; 2, 327.

(6) Mitchell v. Warner, 5 Conn. 497.

(7) Gilbert v. Bulkley, 5 Conn. 262; Morris v. Phelps, 5 John. 49.

(8) Gray v. Briscoe, Noy, 142; Nash v. Aston, T. Jones, 195.

(*a*) No particular significancy is attached to this word.

(*b*) It will be seen hereafter, that for this reason it is not *assignable*

71. The next covenant is that for *quiet enjoyment*, whereby the grantor agrees that the grantee shall hold the land, undisturbed by himself or others. This covenant relates to the possession, not the title, of the land. (See ch. 87, sec. 2.) It does not take effect, unless the grantee has possession. But where there is no other occupant, the deed itself gives him a sufficient constructive possession. This covenant was formerly held to embrace wrongful as well as lawful evictions by third persons. But it is now well settled, that a covenant for title gives the grantee a claim against the grantor, only where the former is disturbed by one having a good adverse claim, unless tortious evictions are included by express words. This principle is founded upon the policy of preventing any connivance between the grantee and a stranger without title, for the purpose of recovering damages from the grantor; and also upon the consideration, that one wrongfully disturbed has a remedy against the wrong-doer. Thus, where a grantor covenants against the acts of himself, and of *every other person or persons whomsoever*, and the grantee is afterwards wrongfully dispossessed by public authority, for an act committed by the grantor before the conveyance; no action lies on the covenant.(1)(a)

72. But a covenant against the acts of a particular person, embraces wrongful acts. So also a covenant against all claims or pretended claims to a particular right in the land. Thus, where a right of common in the land is claimed at the time of the lease, and the lessor covenants for quiet enjoyment against all claiming or pretending to claim any right in the land; the entry of a person having or pretending to have a claim, time out of mind, is a breach of the covenant.(2)

73. A tortious entry by the grantor himself is a breach of the covenant for quiet enjoyment. But not the grantee's own possession.(3)

74. The covenant for quiet enjoyment does not extend to evictions under rights which are acquired subsequently to the conveyance; as, for instance, by the location of a town way. Hence the declaration must allege the adverse right as existing at or before the time of the grant.(4)

75. Upon a somewhat similar principle, where the corporation of the city of New York conveyed land for the purposes of a church and cemetery, and covenanted for quiet enjoyment, and afterwards were empowered by the Legislature to prohibit the use of lands in the city for a cemetery by a by-law; which they accordingly did; it was held that this was not a breach, but *a repeal*, of the covenant; that the act of the city was virtually the act of the Legislature; and that the city was not liable to the grantees.(5)

(1) Mountford v. Catesby, Dyer, 328 a; Hayes v. Bickerstaff, Vaugh. 122; 2 Saun. 178 a, n. 8; 181 a, n. 10; Curtis v. Deering, 3 Fairf. 501; Dudley v. Follitt, 3 T. R. 584; Noble v. Smith, 1 H. Bl. 34; Kelly v. Dutch, &c., 2 Hill, 105; St. John v. Palmer, 5 Hill, 599; Rantin v. Robertson, 2 Strobb. 366; Beebe v. Swartwout, 3 Gilm. 162.

(2) Chaplain v. Southgate, 10 Mod. 384; 2 Wms. Saun. 181, n. 10; Duvall v. Craig, 2

Wheat. 62, n. c; Patton v. Kennedy, 1 Marsh. 389.

(3) Sedgwick v. Hollenback, 7 John. 376; Beebe v. Swartwout, 3 Gilm. 162.

(4) Ellis v. Welch, 6 Mass. 246; Story's Pl. 167; Frost v. Ernest, 4 Whart. 85.

(5) Corpor'n, &c. v. Mayor, &c., 5 Cow. 538; Hobson v. Middleton, 9 D. & R. 247; 6 B. & C. 295.

(a) The covenantor is not bound, where the eviction may possibly be under title derived from the grantee himself. Brookes v. Humphreys, 6 Scott, 756.

76. But the *elder* title, to which the covenant is restricted, is said to mean merely a title *not derived from the grantee himself*. Upon this ground, where a mortgage to the plaintiff was made before a deed to a third person, but the latter was first recorded, and the deed made no exception of the mortgage; the grantor was held liable to the mortgagee upon the warranty in the mortgage.(1)

77. Where the adverse title is not a paramount one, but the grantee is precluded from disputing it by his own acts and declarations; he can make no claim on the warranty.(2)

78. The next covenant is that of *general warranty*; but this, in the United States, is, in fact and in essence, a covenant for quiet enjoyment. It embraces an adverse *possession*, as well as adverse *title*. Thus, eviction by virtue of a term for years is a breach. Otherwise with the covenant of seizin.(3)

79. The covenant of warranty does not imply that of seizin. In a suit upon it, the plaintiff cannot show that *there is no such land* as that which purports to be conveyed.(4)

80. The next covenant is that *against incumbrances*.

81. An incumbrance, in order to fall within this covenant, must be directly upon the land itself, or its proceeds; not upon the value to come out of the proceeds. Thus, in an ancient case, where the covenant was to acquit the party of all charges issuing out of the land, and a subsequent statute gave to the king a tenth of the value, from the issues of lands; this charge was held not to be within the covenant. It would be otherwise with a gift of the issues themselves.(5)

82. Covenant in a deed, that the grantee should have, &c., quietly, &c., without impediment from the grantor or others, and be clearly acquitted, &c., from all former and other grants, &c., rents, rent-charges, &c., and incumbrances whatsoever. The land was held of the lord of a manor under a small quit-rent, incident to the tenure. The grantee was not molested for any arrears, due previous to the covenant. Held, the quit-rent was within the covenant.(6)

83. A covenant for an *indefeasible estate*, "without any manner of condition to alter, change, determine, or defeat the same," is a covenant against incumbrances, as well as of seizin.(7)

84. The next covenant, in England, is for such further assurance as the grantee or his counsel shall lawfully and reasonably require. This covenant is probably not very extensively used in the United States.(8)

85. Where the covenant is for such assurance as counsel shall advise, the assurance must be devised by counsel, and not by the grantee himself, though learned in the law. If for such as the obligee's counsel shall advise; the counsel need not communicate directly with the grantor, but may advise the grantee, and the latter inform the grantor and demand the performance. The covenant is not broken, till the obligee presents a suitable instrument to the grantor, ready to be sealed by him.

(1) *Curtis v. Deering*, 3 Fairf. 499; *Kirby v. Hansaker*, Cro. Jac. 315.

(2) *Kelly v. Dutch*, &c., 2 Hill, 105.

(3) *Emerson v. Prop'rs*, &c., 1 Mass. 467.
(But see *Mitchell v. Warner*, 5 Conn. 522; *Rickert v. Snyder*, 9 Wend. 416.

(4) *Vanderkarr v. Vanderkarr*, 11 John 122.

(5) *Bro. Abr. Grant*, 164; *Touch*, 167.

(6) *Hammond v. Hill*, Com. R. 180.

(7) *Stanard v. Eldridge*, 16 John. 254.

(8) *Nelson v. Harwood*, 3 Call, 394; *Gwynn v. Thomas*, 2 Gill & J. 420; *King v. Jones*, 5 Taun. 418.

The further assurance must be reasonable, and conform to the nature and purport of the original bargain.(1)

86. Covenants for title are inserted in *mortgages*, as well as absolute deeds; and it does not appear that they are to be construed differently in the one case and in the other.(2)

87. Where restrictive and qualifying words are connected with one of several covenants for title, though not with the others; they will be extended to the latter by implication. Thus the covenant of seizin, and a right to convey, is qualified by a subsequent covenant for quiet enjoyment, without let, &c., *by the grantor, and persons claiming under him*.(3)

88. Covenants in a deed: 1. That, *notwithstanding anything by him done*, the grantor was seized in fee; 2. That he had power to sell; 3. That the land was free of incumbrances by him or his father; 4. That the grantee should enjoy against all claiming under the grantor, his father and grandfather. In an action upon the second covenant, held, (North, Ch. J., dissent.) that the restriction of the first covenant was equally applicable to the second.(4)

89. A grantor covenanted that the land contained 600 acres, and then added general covenants of title. Held, the latter covenants were restricted to the quantity of land specified.(5)

90. Covenant of seizin, (generally,) and of warranty against all claims except those of the lord of the soil. Held, the exception applied to both covenants.(6)

91. A deed warranted the estate to the grantee and his heirs against the grantor and his heirs, and proceeded to covenant, that, *notwithstanding any act done by him to the contrary*, the grantor was seized in fee, &c., and that he had good right, full power and lawful authority to convey, &c., in manner aforesaid. The grantee, being evicted by one not claiming under the grantor, brings an action upon the last covenant. Held, this either made part of, or was restricted by, the preceding qualified covenants, and that the defendant was liable only for an eviction by himself, or those claiming under him.(7)

92. But where grantors covenanted, that for and notwithstanding any act, &c., by them, or any, or either of them done to the contrary, they had good right to convey; and also, that they or some one of them, for and notwithstanding, &c., had good right and full power to grant, &c.; and also that the grantee should enter and enjoy the land, without the lawful let or disturbance of the grantors, &c., or for or by any other person; and that the grantee should be kept harmless against all titles, &c., except a certain rent; held, the covenant for quiet enjoyment was not restricted by the qualification annexed to the covenant of a right to convey.(8)

93. A and B, grantors, covenanted severally against their own acts and

(1) Rosewell's case, 5 Rep. 19 b; Miller v. Parsons, 9 John. 336; Higginbottom's case, 5 Rep. 19 b; Heron v. Treynce, 2 Ld. Ray. 750.

(2) Lockwood v. Sturdevant, 6 Conn. 373.

(3) Milner v. Horton, McClel. 647; Miller v. Heller, 7 S. & R. 32; Horsfall v. Testar, 1 Moo. 89; Foord v. Wilson, 2, 592. But see

Fitzgerald, 15, 530; Smith v. Compton, 3 Barn. & Adol. 189.

(4) Gainsford v. Griffith, 1 Saun. 53; Nerven v. Munns, 3 Lev. 46; Broughton v. Conway, Dyer, 240.

(5) Whallon v. Kauffman, 19 John. 97.

(6) Cole v. Hawes, 2 John. Cas. 203.

(7) Browning v. Wright, 2 B. & P. 13.

incumbrances, *and also* to warrant and defend against their own acts, and those of all other persons, and to give an equal indemnity in case of eviction. Held, these covenants were independent of each other; that no eviction or demand of indemnity was necessary, but a prior incumbrance by A and B was sufficient to maintain an action.(1)

94. The covenants above referred to are found contained in deeds of *general warranty*. The covenants in a deed of *quit-claim* or *release* are of a special and qualified nature. With regard to covenants of the latter description, the question may often arise, whether an adverse claimant, asserting his title to the land, falls within the class against whose acts the grantor has covenanted.(a)

95. A purchased lands to himself and B his wife, and to his heirs in fee; and, in a subsequent lease of them, covenanted for quiet enjoyment against the lessor, &c., or any other person *by or through his or their means, title or procurement*. B, after A's death, enters upon the land. Held, a breach, because B's claim is by means of A.(2)

96. It is said, that if a tenant in tail, who purchased the estate, entered into a covenant in these terms, an entry by the issue would be a breach—the latter claiming by *his means*, though not by his title. But, if the issue convey with such a covenant, and their issue enter, this is no breach, because the latter claim by descent. So, if tenant for life covenants thus, and a remainder-man enters, it is no breach, because the latter claims by the conveyance creating the remainder, not by the covenantor.(3)

97. A covenant against any claiming *by, from or under*, the grantor, is broken by a claim of dower on the part of his wife, who claims under

(1) Duvall v. Craig, 2 Wheat, 45.

(2) Butler v. Swinerton, Palm. 339; Butler v. Swinerton, Cro. Jac. 657.

(3) Palm. 340.

(a) Cases have also occurred, where a deed of only the grantor's *right and title*, in and to the land, is accompanied by a general warranty; thus raising the question, whether the former or the latter clause shall control the construction.

Deed of "all my right, title and interest in and unto the ferry called, &c., and the boat which I built and now use in carrying on the ferry, and all the estate, land and buildings standing thereon, as the same is now occupied and improved by me," with covenants of title, general warranty, &c. Held, a conveyance only of the grantor's actual interest, and that the covenants were restricted by the grant. Allen v. Holton, 20 Pick. 458. So, in case of a conveyance of all the grantor's right, &c., and describing the land by metes and bounds, courses and distances. Sweet v. Brown, 12 Met. 175. But, in New Hampshire, where one gave a deed of his right, title, &c., with a covenant to warrant and defend the premises against all lawful claims arising under him; held, the covenant applied to the *land*, not merely to the *right released*. Otherwise, the covenant would be nugatory, having no force, except, possibly, in binding the heirs to defend against a claim of dower. Loomis v. Bedell, 11 N. H. 74.

Conveyance, with covenants of warranty, by metes and bounds, "meaning and intending by this deed to convey all my right, title and interest in and to," the premises. Held, the covenants applied to the land, not merely the grantor's interest in it. Hubbard v. Apthorp, 3 Cush. 419.

Description in the premises of a deed, as follows—"the following described land in Colchester—all the land which I own by virtue of a deed, dated, &c., recorded, &c.; being all my right and title to the land, comprising fifty acres off of the east end of lot No. 75, in said town." The *habendum* was as follows: "to have, &c., the above granted and bargained premises," &c.; and the grantor covenanted, that he was "seized of the premises in fee-simple," and had good right to sell them, that they were free from all incumbrances, and that he would warrant and defend them against the lawful claims of all persons. Held, this was a conveyance of the *land*, not merely of such title as the grantor had, and that he was liable for breach of the covenants. Mills v. Catlin, 22 Verm. 98.

him. Otherwise, if the claim were made by the mother of the grantor.(1)

98. A lessee assigned his lease, to have, &c., in as ample a manner, to all intents, &c., as the assignor might, &c., with a covenant that he had a good and lawful right to bargain and transfer the premises, as above written, and free from arrearages of rent and other incumbrances, &c. Held, the covenant applied only to acts of the lessee, not to the lessor's title.(2)

98 *a.* A deed made in consideration of a discharge of his mortgage to a second mortgagee, having no notice of the first mortgage, to hold to him, so that neither the grantor nor his heirs, nor any person claiming from or under him, or them, should claim or demand any right, &c., in the premises; is a covenant against incumbrances previously made by the grantor. And the grantee, on paying off the first mortgage, may recover the amount of the grantor, if not exceeding the sum due on the note.(3)

99. A claim, made by virtue of an appointment to uses, is a claim under the appointer. Hence such claim is a breach of a covenant, in a subsequent conveyance by him, against all persons claiming *by, from, or under him*.(4)

100. If the covenant is against all persons claiming by *default* of the grantor, it applies to a quit-rent, due before he took the estate, and remaining unpaid at the time of conveyance.(5)

100 *a.* A covenant of warranty "against the grantor and his heirs, and against all and every other person lawfully claiming or to claim," is not broken by the entry and occupancy of the commonwealth in the exercise of its right of eminent domain.(6) A release of damages for such entry and occupancy, executed before the conveyance with warranty, is not an eviction (7)

101. Where a purchaser discovers a defect in the title, he may in equity compel specific performance of the covenant for further assurance, if the transaction is free from all exception. But, if the conveyance itself is void, this covenant is void also; as, for instance, where one covenants to stand seized to the use of a stranger.(8)

102. In addition to the covenants already referred to, there are others, of less frequent use, and perhaps for the most part unknown in this country, which require brief notice.

103. The first of these concerns the *title deeds*. Where a deed contains a covenant of seizin, the grantee is not entitled to the title-deeds. So, where a vendor conveys only a portion of his estate, he for his own security retains his title deeds. In such case, or where for any other cause he retains them, he is bound to covenant for their production, in case of necessity. This covenant runs with the land; but, if the deed containing it is not delivered to a subsequent purchaser, the latter may claim the same covenant from his vendor.(*a*) It is said, the covenant

(1) Godh. 333; Palm. 340.

(2) Knickerbacker v. Killmore, 9 John.

106. See Staines v. Morris, 1 Ves. & B. 8.

(3) Cole v. Lee, 30 Maine, 392.

(4) Hurd v. Fletcher, Doug. 43.

(5) Howes v. Brushfield, 3 E. 491.

(6) Dobbins v. Brown, 2 Jones, 75.

(7) Ib.

(8) 4 Cruise, 326; Johnson v. Nott, 1 Vern. 271; Prec. in Cha. 476. See Tuite v. Miller, 10 Ohio, 382.

(*a*) In Vermont (Anth. Shep. 5; 1 Verm. L. 188, sec. 8.) grantors are required to procure the recording of title deeds unrecorded, on the application of subsequent purchasers.

in question runs with the land, so long only as a privity of estate subsists between the owners of the several estates to which the deeds relate.(1)

104. Where a vendor retains the title deeds, and covenants for further assurance, the purchaser may compel him to covenant for production of the deeds.(2)

105. Leases often contain a covenant *for renewal*. (See *Lease*, Vol. I.) This may be either to give a single new lease, or for perpetual renewal. And the latter object may be effected, by a covenant to grant a new lease, *under the same rents and covenants only as in this lease*, in which case the new lease shall itself contain a repetition of the same covenant. Especially will this construction be given, where, upon the strength of the covenants, the lessee has made great improvements. In cases of this kind, though an action for damages may be brought, a more effectual remedy is a bill in equity, which will decree the execution of a lease with the proper covenants.(3)

106. Lease from A to B for three lives. B covenants to pay A, on the expiration of the first life, a certain fine, to add one other life to the remaining two, and so to continue the renewing this lease or leases, paying to A, his heirs or assigns, the same sum for every life so added or renewed from time to time. A covenants for himself, his heirs, &c., with B, his executors, &c., for said sum to be paid A, his heirs, &c., at A hall, or *at the place where the hall now stands*; to execute one or more lease or leases, *under the same rents and covenants* with these presents; and to add such life or lives as shall be then and there named by B, his executors, &c. The lease was twice renewed, upon the successive expiration of two of the lives. Upon that of the third, one of the renewed lives still continuing, C, an assignee of the lease, brings a bill in equity against D, a grandson of A, but only a tenant for life, for a renewal with the original covenants. Held, the true construction of the original lease was, a covenant for perpetual renewal, and not merely the adding a life upon the expiration of each original one; that the clause respecting the place of payment favored this construction, as it could not be anticipated that the hall would be demolished in three lives; that the fine constituted a valuable consideration, which gave validity to the covenant, notwithstanding its tendency to perpetuity, and, as A might have sold the fee, so he might charge it as he pleased; and that, although the defendant was but a tenant for life, and could not therefore covenant for his heirs, he should covenant for himself and all claiming under him.(4)

107. Lease from A to B, for the lives of B and two other persons, with a covenant, that upon request of B and his heirs, at the decease of the *cestui que vie*, or any of them, to surrender the lease and take a new one, adding one new life to those in being, and upon payment of a broad piece of gold to A, his heirs, &c., for every additional life, at the expense of B, A, his heirs, &c., would make to B, his heirs, &c., a new lease for the lives of the two persons named in the former lease, who should then be living, and of such other person as B, his heirs or as-

(1) *Abbott v. Allen*, 14 John. 248; *Spencer's case*, 5 Co. 16 a; *Vyvyan v. Arthur*, 1 Barn. & Cr. 416; *Paul v. Nurse*, 8, 486; 4 Cruise, 326-7; *London Law Mag.* No. 22, art. 4.

(2) *Fain v. Ayers*, 2 Sim. & St. 533.
(3) *Bridges v. Hitchcock*, 5 Bro. Parl. 6; *Ponsonby v. Adams*, 2 Ib. 431; 3 Atk. 83.
(4) *Furnival v. Crew*, 3 Atk. 83.

signs, should nominate, in lieu of the person named in the prior lease, as the same should respectively die, under the above named annual rent, and the same covenants therein contained. This instrument was itself the renewal of a lease made fifty years before, and successively renewed with the same clause of renewal. Another life having expired, upon the question whether a new lease should be executed in the same terms; held, the parties by their acts had given a construction to the instrument, and the clause in question must be inserted.(1)(a)

108. The principle, to be derived from the foregoing series of cases, seems to be directly contradicted by others of equal authority, and subsequent in time to those already stated. The doctrine of these cases is, that the courts lean against construing a covenant to be for perpetual renewal, unless such intention is perfectly clear. And the same construction is adopted in equity as at law.(2)

109. A, having a long term, leased it for five years to B, and covenanted for himself and his ancestors to renew this lease at the same rent, *and on the same covenants*, upon the request of B, within the term. Held, B could not claim to have a covenant for renewal in a new lease.(3)

110. Lease for 21 years from A to B, with a covenant that A, at the end of the first seven years, would, on the surrender of the lease, make a new one for 21 years, at the same rent, and with the same covenants as were reserved and contained in the old lease. Upon a bill for specific performance by B against the executor of A, held, B was not entitled to a covenant of renewal in the new lease, no such intention appearing, and as this construction would amount to a conveyance in fee.(4)

111. Demise for 99 years, if three persons, or any of them, should so long live, with a covenant by the lessor for himself, his heirs and assigns, (for a consideration in each case,) upon the death of any of said lives, to add a new life, or, upon the death of two of them, to add two new lives; or, upon the death of all of them, to make a new lease for three new lives, to be nominated by the lessee, his executors, administrators or assigns, for the like term as was thereby demised; at and under the like rent, covenants and agreements, therein contained. The lives having all expired, the lessee demanded a new lease, renewable upon the dropping of three new lives, with the same covenant for renewal contained in the first lease. Held, the covenant bound the lessor to grant a new lease only on the death of one of the *cestuis que vie* named; that, after the death of all of them, no further renewal could be claimed; but only a new lease for 99 years, renewable on the death of three persons named, but without any covenant for further renewal.(5)

112. A lessor covenanted to let the premises to the lessee at the end of the term, but for no stated price. Held, if this were a valid cove-

(1) Cooke v. Booth, Cowp. 819.

(2) Moore v. Foley, 6 Ves. 232; Tritton v. Foote, 2 Cox, 174.

(3) Hyde v. Skinner, 2 P. Wms. 196.

(4) Davis v. Taylor, &c., 2 Harg. Jur. Arg.

427; (Tritton v. Foote, 2 Bro. 636;) City, &c. v. Mitford, 14 Ves. 53; 7 E. 237; Moore v. Foley, 6 Ves. 232; Iggulden v. May, 9 Ves. 325; Harg. Jurid. Exer. 3, 222.

(5) Russel v. Darwin, 2 Bro. 639, n.

(a) The ground of this decision was strongly disapproved in a subsequent case in Chancery, by Lord Alvanley. Baynham v. Guy's, &c., 3 Ves. 298. And in another case by Lord

nant, it would not be for *perpetual* renewal, but only for a single renewal, at the end of the term; but further, that it was void for uncertainty.(1)

113. A lessee may forfeit his right of having a renewal by an unreasonable neglect to apply for it.

114. Demise to A for 99 years, if three specified lives should so long live, with a covenant to renew, and a proviso, that if the lessee, his executors, &c., refused or neglected to renew, or to make application therein after the death of the first or any of the lives for two years, the lease should be void. Within a year from the expiration of the last life, A applied for a renewal. Held, the right of renewal was lost.(2)

CHAPTER LXXXVII.

COVENANTS—BREACHES, DAMAGES, ETC.

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| 1. What is a breach of the covenants of seizin and of warranty. | it applies; damages upon; whether assignable, &c. |
| 10. Exceptions in South Carolina, Ohio, &c. | 63. Mutual bearing of covenants upon each other. |
| 12. Amount of damages. | 68. Grantee, when estopped to deny grantor's seizin; re-conveyance, reciprocal covenants, &c. |
| 29. Who may sue upon the covenants in a deed; covenants, whether assignable; <i>present and future</i> . | 72. Incumbrance assumed by grantee. |
| 38. Intermediate warrantor, suit by. | 75. Miscellaneous points in relation to covenants. |
| 41. Liability of executors, &c. | 82. Estoppel. |
| 47. Covenant against incumbrances; to what | |

1. THE effect of the covenants in a deed is, to give the grantee a claim for pecuniary damages in case of any defect in the title. The circumstances, necessary to maintain an action, depend upon the particular covenant which has been broken. The covenants of seizin, a right to convey, &c., being broken by the mere existence of an adverse title, nothing further is necessary to sustain an action for a breach.(3)(a)

2. On the other hand, the covenants of warranty and for quiet enjoyment(b) are not broken, until the adverse title is actually enforced

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| (1) Abeel v. Radcliff, 13 John. 297. | 421, 430; Duvall v. Craig, 2 Wheat. 62, n. c; |
| (2) Baynham v. Guy's, &c., 3 Ves. 295. | McCarty v. Leggett, 3 Hill, 134; Mills v. Catlin, 22 Verm. 98; Tarpley v. Poage, 2 Texas, 139; Parker v. Brown, 15 N. H. 176. |
| (3) Bradshaw's case, 9 Co. 60; 2 Wms. Saun. 181, n. a; Pollard v. Dwight, 4 Cranch, | |

(a) Hence, in an action upon a covenant of seizin, it is not necessary to allege an eviction. *Le Roy v. Beard*, 8 How. 451.

So in a suit on the covenant of seizin, or of a right to convey, the breach may be assigned by negating the words of the covenant. *Floom v. Beard*, 8 Blackf. 76.

But the assignment of a breach upon the covenant against incumbrances must set forth the incumbrance complained of. It is not sufficient to allege that the defendant has not kept and performed his covenant. *Mills v. Catlin*, 22 Verm. 98.

A plea of general performance is insufficient, in an action on the covenant of seizin. The plea should show performance, by setting out a good title. *Bird v. Smith*, 3 Eng. 368.

(b) It is said, a difference exists between an eviction under a covenant for quiet enjoyment, and one under a covenant of warranty. The former covenant relates only to the possession, and the eviction is merely required to be of lawful right; while the latter relates to the title, and the eviction must be not only by lawful right, but by paramount title. [Per Edmonds, J.] *Fowler v. Poling*, 6 Barb. 165. (See ch. 86, sec. 71.)

by actual entry or acknowledgment of title, to the injury of the covenantor.^(a) It has been said in New Jersey,⁽¹⁾ that, to authorize a recovery upon these covenants, there must be a disturbance in, or deprivation, or cessation of, the possession, by the prosecution and operation of *legal measures*. In other words, there must be an *eviction*, the technical meaning of which is, dispossession *by judgment of law*. But in Massachusetts, and this is doubtless the prevailing doctrine, nothing more is necessary to sustain an action than an *ouster* or lawful disturbance; as, for instance, in case of incumbrance consisting in a mortgage, the entry of the mortgagee in presence of witnesses, for breach of condition and for the purpose of foreclosure; and such disturbance is also expressed in popular language, which is recognized by the courts, by the term *eviction*. So if, at the time of sale, there is a paramount title and an adverse possession under it, the holding out of the purchaser will be equivalent to an eviction. It is well settled, on the one hand, that the grantee may voluntarily surrender the land to a claimant having a good title,^(b) and, on the other, that he may stand a suit therefor; and in both cases be entitled to damages, and in the latter case to the costs of suit also, upon proving the adverse title to be valid. The burden of proof is upon the grantee to show that the adverse title was good, unless a judgment have been recovered against him, and he gave notice to the grantor of the suit, so that he might defend it; or the judgment was obtained by collusion or negligence of the purchaser.^(c) In case of a judgment, the judgment itself is the best, but not, it seems, the only evidence, in a suit upon the covenants. The record, except

(1) *Stewart v. Drake*, 4 Halst. 141.

(a) So, Chancery will not *enjoin* the collection of a note for the price of land sold, on account of a defective title, unless there has been an eviction. *Meadows v. Hopkins*, 3 Port. 181. *Aliter*, in case of eviction. *Cullum v. Branch, &c.*, 4 Alab. (N. S.) 21. Chancery will not enforce covenants of warranty. *Tuite v. Miller*, 10 Ohio, 382.

But where a vendee has not been evicted, but discovers a partial failure of title fraudulently concealed from him by the vendor; he is not obliged to rely upon his covenants, but may have relief in equity. *Gilpin v. Smith*, 11 S. & M. 109.

(b) So he may buy it in, and claim on the warranty. *Davenport v. Bartlett*, 9 Ala. 179. See further, *Hunt v. Amidon*, 4 Hill, 345; *St. John v. Palmer*, 5 Ib. 599.

(c) This is in analogy to the ancient law of *voucher* in case of warranty. (See ch. 85.) In Connecticut, the practice is still retained under the title of *voucher*. Notice is given by a prescribed form of process, which becomes part of the record. If the *vouchee* does not appear, the judgment proves the amount of damages. If he does appear and defend, the judgment is strong evidence, but not conclusive, or an *stoppel*, against him. The rule is the same where the adverse suit is brought against the tenant of the grantee, instead of himself. *Belden v. Seymour*, 8 Conn. 304. See *Kelly v. Dutch, &c.*, 2 Hill, 105. The notice to a warrantor must be unequivocal, certain and explicit. *Paul v. Witman*, 3 Watts & S. 407. That the general rule is not adopted in South Carolina, see *Buckles v. Morrison*, 1 Stroob. 443.

The purpose of such notice, is not merely information that such an action is pending, but it is in the nature of a *prayer in aid*. The warrantor may know of facts, or be in possession of evidence, not known to the party sued, which would furnish the means of a successful defence. *Prop'rs, &c. v. Bullard*, 2 Met. 365.

If a covenantee sues one in possession and fails, the judgment against him is no evidence, though, in a suit against the covenantor, he was notified. *Ferrell v. Alder*, 8 Humph. 44.

A *verdict* for plaintiff, in an ejectment suit, not followed by a judgment, is not an eviction. *Miller v. Avery*, 2 Barb. Ch. 582.

in case of *notice*, as above mentioned, proves only the fact of eviction, not the validity of the adverse title.(1)(a)

3. Notice, unless appearing by the record, is a question for the jury.(2)

4. Actual entry of the plaintiff is not necessary to constitute eviction. His deed gives him a constructive possession, which is equivalent to an entry. So, where there is a sale at auction under a prior title, and the grantee is the purchaser; this is an eviction, without actual dispossession. The plaintiff need not allege or prove *payment* of the purchase-money.(3)

5. In a suit for dower, brought by the widow of one who held the land before the covenantor, the covenantee confessed judgment, and then filed a bill in equity, and obtained an injunction against her, which bill was dismissed on final hearing, and the widow recovered her dower from the land. In a suit upon the covenant against incumbrances, held, it was no defence, that the plaintiff did not *appeal* in the former proceedings.(4)

6. The mere suing out of a writ by an adverse claimant, and its return to court, are no evidence in a suit upon the covenants of warranty. Nor a judgment between third persons, that one of them has a title to the land. Nor is a judgment in ejectment against the grantee a sufficient breach of the covenant for quiet enjoyment.(5)

7. Where there is a mortgage upon the land granted, which is sold by order of court, and bought in by the grantee, this does not entitle him to recover upon the covenant for quiet enjoyment. But, where land conveyed was subject to a prior mortgage, upon which the mortgagee brought a suit for foreclosure, making the grantee a party, and upon a sale under the decree of foreclosure the mortgagee purchased the land, and the decree ordered that the purchaser be let into possession, and the mortgagee afterwards offered to sell, and paid the taxes upon the land; held, an eviction. So, also, where the adverse claimant brings trespass against the grantee, the title is put in issue, a verdict rendered for the plaintiff, and the defendant surrenders possession.(6)

(1) *Witty v. Hightower*, 12 S. & M. 478; *Wilson v. McElwey*, 1 Srobh. 65; *Collingwood v. Irwin*, 3 Watts, 306; *Clarke v. McNulty*, 3 S. & R. 364; *Castleton v. Miner*, 8 Verm. 209; *Sprague v. Baker*, 17 Mass. 590; *Hamilton v. Cutts*, 4, 349; *Ives v. Niles*, 5 Watts, 323; *Foster v. Pierson*, 4 T. R. 617; *Hodgson v. E. I. Co.*, 8, 278; *Chapman v. Holmes*, 5 Halst. 20; *Fenwick v. Forrest*, 5 Har. & J. 415; *Lee v. Cooke*, 1 Wash. 306; *Emerson v. Prop'r's &c.*, 1 Mass. 464. (See *Carter v. Carter*, 1 Bai. 217; *Bordeaux v. Cave*, Ib. 250; *Westbrook v. McNeillan*, Ib. 259; *Greenmault v. Davis*, 4 Hill, 643; *White v. Whitney*, 3 Met. 81; *Turner v. Agnew*, 1 Ohio, 386; *Boothby v. Hathaway*,

2 Apple. 251; *Loomis v. Bedel*, 1 N. H. 74; *Stewart v. West*, 2 Har. 336.

(2) *Collingwood v. Irwin*, 3 Watts, 306.

(3) *Curtis v. Deering*, 3 Fairf. 499; *St. John v. Palmer*, 5 Hill, 599; *Loomis v. Bedel*, 11 N. H. 74; *Pence v. Duvall*, 9 B. Mon. 48.

(4) *Dimond v. Billings*, 2 Har. & Gill. 264; *Lit. Sel. Cas.* 433.

(5) *Fenwick v. Forrest*, 5 Har. & J. 414; 3 Bibb, 174; *Emerson v. Prop'r's &c.*, 1 Mass. 464; *Kerr v. Shaw*, 13 John. 236; *Paul v. Witman*, 3 Watts & S. 407.

(6) *Waldron v. M'Carty*, 3 John. 471; *St. John v. Palmer*, 5 Hill, 599; *Sterling v. Peet*, 14 Conn. 245.

(a) As to *identifying* the land in question, see *Hough v. Trouts*, 2 Penn. 198.

A judgment in ejectment rendered in another State, under which there is an eviction, is evidence, in Georgia, of a breach of a covenant of warranty, unless impeached for fraud or want of jurisdiction. *Davis v. Smith*, 5 Geo. 274.

An eviction must be on a title paramount. *Ib.*

And this is negatived by a fraudulent combination between a covenantee and the plaintiff in ejectment, to procure a judgment and eviction. *Th*

7 *a*. A covenant for quiet enjoyment is broken by a sheriff's sale, under a paramount incumbrance, although one of the assignees of the covenantee purchases the property, and there has been no other ouster.(1)

8. Where the land warranted has been sold on execution against the grantor, in pursuance of a judgment which constituted a lien at the time of the conveyance; the covenantee cannot sustain his action, by proving a certain person to be in possession, under a grantee of the execution purchaser. He must show a *deed* from such grantee; for the mere possession might be *wrongful*.(2)

9. It has been held in Connecticut, that the covenants of warranty, and for quiet enjoyment, embrace only an adverse right to *lands and tenements*, not to a mere *hereditament*; as, for instance, the right of *taking water* from the land granted.(3) (See ch. 86.)

10. The general rule, that eviction is necessary to sustain an action upon the covenant of warranty, seems to have been somewhat departed from in South Carolina. Thus, where the terms of the covenant are "to warrant and for ever defend, &c., to A, &c., against every person, lawfully claiming, or to claim the same, or any part thereof," it is held, partly on account of the peculiar phraseology used, that an action lies, charging that the grantor, at the time of sale, was not the owner of the land, but it belonged to one B, who then lawfully claimed the same, and that the grantor refused to warrant the said land against the said lawful claim of said B.(4)

11. So, in Ohio, it has been intimated, that under a statute relating to covenants, eviction is not necessary to sustain an action. But a later case decides to the contrary. In the same State, where, after judgment in ejectment, the defendant avails himself of the occupying claimant law, under which the case is settled, an action lies upon the warranty, without eviction. In Kentucky, a judgment against the grantee is equivalent to eviction. And in an action by *heirs*, an averment of eviction under an adverse paramount title is unnecessary.(5)

12. *The amount of damages* to be recovered depends upon the particular covenant which is broken, and the manner in which a breach takes place. It seems to be the universal rule, subject to be varied only by special circumstances; that, upon the covenants of seizin, &c., the measure of damages is the consideration paid, with interest.(a) No estate

(1) *Brown v. Dickerson*, 2 Jones, 372.

(2) *Jenkins v. Hopkins*, 8 Pick. 349-50.

(3) *Mitchell v. Warner*, 5 Conn. 497.

(4) *Mackey v. Collins*, 2 Nott & M'C. 186.

(5) *Day v. Brown*, 2 Ohio, 346; *Hanson v.*

Buckner, 4 Dana, 254; *Robinson v. McNeil*, 3, 525; *King v. Kerr*, 5, 156; *Pence v. Duval*, 9 B. Mon. 48; *Glenn v. Thistle*, 23 Miss. 42.

(a) But where the grantor was not seized at the time of conveyance, but afterwards became so, and the grantee thereby acquired a title by estoppel, under the covenants of warranty; held, he could not retain the land, and still recover back the consideration, upon the covenant of seizin. *Baxter v. Bradbury*, 7 Shepl. 260.

The subsequent seizin of the grantor, of a part of the land, reduces the damages *pro tanto*. *Cornell v. Jackson*, 3 Cush. 506.

Where the grantee of a large tract was evicted from a portion, to which he subsequently received a good title from his grantor, he was held entitled to compensation for the actual injury to the premises by the adverse claimant, and, having given a bond for the purchase-money, to a deduction of the interest on the sum paid for the land during the period between his eviction and the restoration of his title. *Singleton v. Allen*, 2 Strobb. Eq. 166.

having ever passed to the grantee, the value of the land does not come at all in question. In case of an incumbrance, the damages will, in general, be the sum paid for removing it, whether before suit commenced upon the covenant, or after; or, if not removed, they will be merely nominal.^(a) The consideration paid for the deed is immaterial. If the amount of incumbrance exceed the value of the property or price paid, the latter is the measure of damages. As to the amount of damages upon the covenants of warranty, &c., the rule is variously settled in different States. In general, it is the consideration paid,^(b) with interest. But in Massachusetts, Connecticut and Maine, and formerly in South Carolina, (though the rule is now changed,) the value of the land at the time of eviction, with interest. In Pennsylvania, the price paid, with interest from the time of ceasing to receive the profits.⁽¹⁾

13. In Virginia, the earlier cases regard the value as the correct standard. But, in a later case, the prior decisions are reviewed, and, so far as they favor this doctrine, overruled, and the value of the land at the time of the warranty established as the measure of damages, both in law and equity. (Coalter, J., dissented.) In a subsequent case⁽²⁾ the question seems to be still left open, between the consideration paid, and the value of the land at the time of warranty.^{(3)(c)}

(1) *Rickert v. Snyder*, 9 Wend. 416; *Dimmick v. Lockwood*, 10, 142; *Adm'r. &c. v. M'Coy*, 3 Ohio, 218; *Ib.* 525; *Stout v. Jackson*, 2 Rand. 132; *King v. Kerr*, 5 Ohio, 156; *Thuelkeld v. Fitzhugh*, 2 Leigh, 451; *Davis v. Hall*, 2 Bibb., 590; *Garrison v. Sandford*, 7 Halst. 263; *Innes v. Agnew*, 1 Ohio, 389; *Big. Dig.* 260-1; *Leffingwell v. Elliott*, 8 Pick. 455; 10, 204; *Wetmore v. Green*, 11, 464; *Curtis v. Dearing*, 3 Fairf. 499; *Tapley v. Labeaume*, 1 Misso. 552; *Martin v. Long*, 3 *Ib.* 391; *Cannell v. McLean*, 6 Har. & J. 297; *Henning v. Withers*, 2 *Tred. Con.* 584; *Ware v. Weathnall*, 2 *McCord*, 413; *S. C. St.* 1824; *Seamore v. Harlan*, 3 *Dana*, 415; *Buckmaster v. Grundy*, 1 *Scam.* 312; *Kelly v. Dutch, &c.*, 2 *Hill*, 105; *Spring v. Chase*, 9 *Shepl.* 505; *Patterson v. Stewart*, 6 *Watts & S.* 527; *Sterling v. Peet*, 14 *Conn.* 245; *Norton v. Babcock*, 2 *Met.* 510; *White v. Whitney*, 3, 81; *Brooks v. Moody*, 20 *Pick.* 474; *Earle v. Middleton*, 1 *Cheves*, 127; *Brown v. Dickerson*, 12 *Penns.* 372; *Copeland v. Copeland*, 30 *Maine*, 446; *Streeter v. Henley*, 1 *Smith*, 187; *Henderson v. Henderson*, 13 *Miss.* 181; *Bircher v. Watkins*, 13 *Mis.* 521.

(2) *Nelson v. Matthews*, 2 *Hen. & M.* 177; *Mills v. Bell*, 3 *Call*, 322; *Stout v. Jackson*, 2 *Rand.* 132; *Thuelkeld v. Fitzhugh*, 2 *Leigh*, 451.

(3) *Swett v. Patrick*, 3 *Fairf.* 9; *Leffingwell v. Elliott*, 10 *Pick.* 204; 8, 455.

If the grantor was not seized of a part of the land, the measure of damages is the proportion of the value of this part to the whole. *Cornell v. Jackson*, 3 *Cush.* 506. (See sec. 16.)

In New Hampshire, the measure of damages is the value of the premises at the time of delivery of the deed. *Parker v. Brown*, 15 *N. H.* 176.

(a) If the grantor has previously mortgaged the land, for an indemnity against a certain liability, the grantee cannot recover the amount of such liability, till he has discharged it. *Comings v. Little*, 24 *Pick.* 266.

The diminished value of an estate, by reason of an incumbrance upon it, is not the measure of damages, unless the purchase was made for the purpose of a resale, with the knowledge of the grantor. *Batchelder v. Sturgis*, 3 *Cush.* 201.

The sum paid to extinguish outstanding incumbrances will not be allowed as a set-off in an action for the purchase-money, nor under the plea of failure of consideration. *Cole v. Justice*, 8 *Ala.* 793.

(b) Sometimes spoken of as *the value of the land*. But this is measured by the consideration. 4 *Kent*, 475. If the grantee buys in the adverse title, the damages are the sum paid, with an allowance for his cost and trouble. 11 *N. H.* 74.

(c) Upon a bond to convey land, the measure of damages for a breach is the value of the land at the time of contract, not the consideration to be paid. 6 *Har. & J.* 297. In Ohio, the rule of damages, on a covenant of warranty, is the actual loss sustained, to be ascertained under the occupying claimant law. *King v. Kerr*, 5 *Ohio*, 156. See *Wilson v. Tappan*, 6 *Ib.* 172. Where an action is founded upon both the covenants of seisin and warranty, the

14. It has been already stated, that the grantee is not bound, though he has a right to surrender the land without suit. Hence the damages shall include the costs and counsel fees, incurred in the suit of the adverse claimant against him; but not counsel fees, where the land was given up without suit, nor the costs of a suit brought by an assignee of the plaintiff upon his, the plaintiff's own covenants.(a) He may recover for his trouble and incidental expenses.

15. A grantee may recover money paid to extinguish the adverse title, whether before or after commencement of suit.(1)

16. Where eviction is from only part of the land, the jury may either give damages for such part, or for the whole, and thereby rescind the contract.(2) (See p. 407, n.)

17. In an action upon the covenant of seizin, the defendant may show that nothing was in fact paid for the particular land in question, or that it was included by mistake. So, where the land conveyed consists of two portions, with a separate price for each, he may prove, to reduce the damages, that the title failed to only one portion. So, it may be proved, that the consideration was *greater* than is stated in the deed. So, if the grantor had a *life estate*, the value of such estate shall be deducted from the damages. But, in a suit brought by an assignee, the consideration expressed in the deed cannot be disputed.(3)

18. Where, in Connecticut, the covenant of seizin is broken by a mortgage upon the land, the measure of damages is the amount of the mortgage.(4)

19. In an action upon the covenant of seizin, it seems, the defendant may claim allowance for the profits of the land received by the plaintiff, and for which an action is barred by lapse of time.(5)

20. If the grantee retains possession of the land long enough to give him a good title by lapse of time, merely nominal damages shall be recovered upon the covenant of seizin. So, in New York, only six years'

(1) *Leffingwell v. Elliott*, 10 Pick. 204; 8, 455.

(2) *Liber v. Parsons*, 1 Bay, 19.

(3) *Barnes v. Learned*, 5 N. H. 265; *Guthrie v. Pugsley*, 12 John. 126; *Morse v. Shattuck*, 4 N. H. 229; *Ela v. Card*, 2, 175; *Har-*

low v. Thomas, 15 Pick, 66; *Leland v. Stone*, 10 Mass. 459; *Belden v. Seymour*, 8 Conn. 304; *Lockwood v. Sturdevant*, 6 Conn. 373; *Greenvault v. Davis*, 4 Hill, 643.

(4) *Gilbert v. Bulkley*, 5 Conn. 262.

(5) *Whiting v. Dewey*, 15 Pick. 428.

plaintiff may elect to take judgment on either, and recover damages accordingly. 14 Conn. 245.

On the covenant for quiet enjoyment, in case of sheriff's sale upon a paramount incumbrance, the measure of damages is the price paid at the sale, or the value when the covenant was entered into. *Brown v. Dickerson*, 12 Penn. 372.

A purchaser legally evicted, and who re-purchases the property from the evictor, holds under a new title; and the price last paid is not the measure of damages in a suit upon the warranty. *Martin v. Atkinson*, 7 Geo. 228.

Interest is generally allowed, because the adverse claimant has a remedy for mesne profits. But when he has no such claim; it will not be allowed. *Thompson v. Jones*, 11 B. Mon. 365.

Where the purchaser enjoyed the land until a title was acquired by a subsequent patent, under which he was evicted; held, he should be allowed interest only from the date of the patent. *Kyle v. Fauntleroy*, 9 B Mon. 620.

(a) It has been intimated, that, in order to recover the costs, &c., incurred in a prior suit, the present defendant must have been notified. 3 Fairf. 9. Where a *lessee* covenants to repair, and underlets, with a promise of indemnity by the sub-tenant; the latter is not bound to pay the costs of a suit against the former upon such covenant. *Walker v. Hatton*, 10 Mees. & W. 249; *Penlay v. Watts*, 7, 601.

interest is recoverable, the covenantee being answerable for the profits of the land only for this length of time.(1)(a)

21. It is no mitigation of damages in an action upon the covenant of seizin, that the plaintiff has exercised acts of ownership upon the land—as by cutting timber; for he is liable for such acts to the true owner.(2)

22. The rule of damages above stated applies to a lessee as well as a grantee in fee. Upon the covenant for quiet enjoyment, (in New York,) he can recover only nominal damages, with no allowance for improvements, unless he paid a consideration. But it is intimated, that an action on the case might lie. In case of fraud, with regard to incumbrances, this action would clearly lie.(3)

23. Where a grantee is evicted under a claim of dower, the measure of damages is the present value of an annuity, equal to the interest of one-third of the consideration paid, for the probable duration of the life of the dowress.(4)

23 a. Where the plaintiff proves an outstanding life estate, as a breach of the covenant of seizin, and gives evidence as to the age and general state of health of the tenant for life, and the annual value of the premises; the court may legally allow Dr. Wigglesworth's tables for estimating life estates to be used by the jury, in computing the damages, under proper instructions as to the use of them.(5)

24. Where a grantee is evicted, he shall recover as damages the nominal pecuniary consideration, although it was paid in property extravagantly estimated.(6)

25. But, where an adverse title is extinguished for a nominal sum, this is the measure of damages.(7)

26. Where a suit is brought in one State upon covenants in a deed of land lying in another, the damages will be assessed according to the law of the former State.(8)

27. In Pennsylvania, under the implied covenant arising from the words *grant*, &c., the grantee may recover nominal damages on account of a mortgage upon the land, though not due at the commencement of suit. If the declaration allege that the land is of less value on account of the mortgage, less saleable, and that it has been sold by legal process for a smaller sum, the plaintiff may recover the amount of the mortgage.(9)

28. Where a sheriff conveys an equity sold on execution, he covenants only for the legal regularity of his own proceedings. For breach of such covenant, the measure of damages is the consideration paid and

(1) *Garfield v. Williams*, 2 Verm. 327; *Caulkins v. Harris*, 9 John. 324.

(2) *Catlin v. Hurlburt*, 3 Verm. 403.

(3) *Kinney v. Watts*, 14 Wend. 38; *Rickert v. Snyder*, 9 Wend. 416; *Dimmick v. Lockwood*, 10, 142.

(4) *Wager v. Schuyler*, 1 Wend. 553.

(5) *Mills v. Catlin*, 22 Verm. 98.

(6) *Taylor v. Knox*, 1 Dana, 396.

(7) *Leffingwell v. Elliott*, 10 Pick. 204; 8, 455.

(8) *Smith v. Strong*, 14 Pick. 128. (See *Stout v. Jackson*, 2 Rand. 171.)

(9) *Funk v. Voneida*, 11 S. & R. 109.

(a) It is held, in Maine, that nominal damages only are recovered upon this covenant, where, after action commenced, the defendant has gained a good title; because it enures to the benefit of the plaintiff, by estoppel. *Baxter v. Bradbury*, S. J. C. Maine, June, 1841; *Law Rep.* Oct. 1841, p. 231. In New York, this circumstance is held to be no legal bar to the action, but probably a ground for mitigation of damages. Whether the plaintiff, in reply, may show that he has failed to sell the land advantageously, through defect of title, *qu.?* *McCarty v. Leggett*, 3 Hill, 134.

interest. But, if the purchaser holds a second execution, in satisfaction of which the surplus proceeds of sale are applied, the measure of damages is the value of the equity, not the sum bid and stated in the deed.(1)

29. It is laid down generally, by many English authorities, that the covenants for title are *real*; that they pass to all persons claiming under the grantee, and charge the assigns, heirs, executors, &c., of the grantor, whether the conveyance be a deed at common law, or under the statute of uses. So an assignee *in law* may sue upon a covenant; as, for instance, an execution purchaser.(2) Upon this subject, however, the following important distinction is now well established.

30. Covenants are *present* or *future*. Of the former class are the covenants of seizin, and a right to convey; of the latter, those of warranty and for quiet enjoyment. The latter alone are, strictly speaking, *real covenants*, the characteristic of which is, that they are assignable with the land. The covenants of seizin, &c., are *personal* to the first grantee, because, if broken at all, it is at the time of the first conveyance, and they have become *choses in action*, not assignable. Hence, in an action upon them, no allegation of eviction is necessary. So, after a nominal transfer of the land, the first grantee may still sue upon these covenants. Nor does this involve the inconvenience of having the land vested in one person, and the covenants in another; because it is the necessary consequence of a breach of them, that nothing passed to the first grantee, and of course he can convey nothing.(3)(a)

31. In Massachusetts, if the grantor were disseized, an assignee cannot sue either upon the covenant of seizin, or of warranty.(b) So, in Ohio and New York, where a grantor is in actual possession, his covenants of seizin and of right to convey are real, and attach to and run with the land; but, if he is not in actual possession, either in fact or in law, the covenants are *in presenti*, and personal, and no one can maintain an action on their breach, but the grantee.(4)

32. Upon the principle above stated, the covenant of seizin, upon the grantee's death, passes to his executors, not to his heirs.(5)(c)

(1) Wade v. Merriam, 11 Pick. 280.

(2) Spencer's case, 5 Co. 17 b; Walker's case, 3, 22; Middlemore v. Goodale, Cro. Car. 503; Derisley v. Custance, 4 T. R. 75; Spencer v. Boyes, 4 Ves. 370; M'Crary v. Brisbane, 1 M'Cord, 104; Willard v. Tillman, 2 Hill, 274.

(3) Donnell v. Thompson, 1 Fairf. 174; Wetmore v. Green, 11 Pick. 464; Bartholomew v. Candee, 14 Pick. 167; La Roy v. Beard, 8 How. 451; Catlin v. Hurlbert, 3 Verm. 403; Shep. Touch. 170; Bradshaw's case, 9 Rep. 60; Chapman v. Holmes, 5 Halst. 20, 29; Big. Dig. 87; 4 Kent, 251;

Lewes v. Ridge, Cro. Eliz. 863; Clark v. Redman, 1 Blac. 380; Lant v. Norris, 1 Burr. 289; Mitchell v. Warner, 5 Conn. 497; Claunch v. Allen, 12 Ala. 159; Adm'r. &c. v. M'Coy, 3 Ohio, 211; Bickford v. Paige, 2 Mass. 455; Wheelock v. Thayer, 16 Pick. 68; Griffin v. Fairbrother, 1 Fairf. 91; Logan v. Moulder, 1 Ark. 323; Chase v. Weston, 12 N. H. 413; Cornell v. Jackson, 3 Cush. 506; Ross v. Turner, 2 Eng. 132.

(4) Bartholomew v. Candee, 14 Pick. 167; Devore v. Sunderland, 17 Ohio, 52; Fowler v. Polling, 2 Barb. 300.

(5) Hamilton v. Wilson, 4 John. 72.

(a) On the same principle, the assignee of a covenant running with the land cannot maintain an action for a breach, which occurs before the assignment; such breach being a chose in action, not running with the land. Shelton v. Codman, 3 Cush. 318.

(b) But acts of ownership in land may be such as to give a title in reference to third persons, though not sufficient for a disseizin of the true owner. Hence, if A, the occupant, convey with warranty to B, and B to C, C may sue A upon his covenant. It runs with the land. Slater v. Rawson, 6 Met. 439.

(c) So, the executor must sue for a breach of warranty. Beddoe v. Wadsworth, 21 Wend. 120. But where land, sold on the warranty, descends to the heirs of the grantee, they have the right of action for a breach. Perce v. Duvall, 9 B. Mon. 48.

33. The above is, undoubtedly, the prevailing rule of law. The principle, that a *present* covenant is not assignable, must be considered as resting upon solid foundations, and as the well established rule in this country. But, it is held, in a modern English case, that though the covenant of seizin is broken, if at all, at the making, yet the breach is a *continuing one*, and an assignee may sue. Thus, a devisee, though not an executor, may sue upon the covenant of seizin.(1)

34. As to the right of an assignee to sue upon a covenant for title, it was contended in South Carolina, (1818,) that no such action would lie, *for want of privity*. Cheves, J., remarked, that the action was a *perfect stranger* in the courts of that State; and that the English authorities upon the subject were obscure, from failing to discriminate exactly between the common law and the statute of Henry VIII. None of them, however, go so far as to say, that at common law an assignee could not sue upon a covenant running with the land. The statute is intended to benefit only the assignee of a *reversion*, and appears to apply only to leasehold estates.(2)

35. One merely entering, and claiming title to land, cannot sue upon covenants made to a prior occupant. He must prove a title by deed.(3)

36. It has been held, in Vermont, that where a grantee, after transferring the land, sues upon the covenant of seizin, the court will stay execution, till he lodges a discharge or quit-claim, from the assignee.(4)(a)

37. An assignee may sue upon the original warranty, though he received no covenant from his immediate grantor.(5)

38. An assignee may sue any one or more of the prior grantors, upon the covenants, and have several judgments, though but one satisfaction.(6) On the other hand, an action will lie not only against, but in favor of, distinct and successive parties to a covenant of warranty. The assignor, or original grantee may sue, as well as the assignee. What is necessary to authorize such suit seems somewhat doubtful.

39. Where the original grantee, or his assignee, has transferred the land, not absolutely, but by a mortgage, he may maintain an action upon the warranty; but the amount of the mortgage shall be deducted from his damages, because the mortgagee may himself bring a suit for this amount. But, if the plaintiff take up the mortgage at any time *before judgment*, he may have full damages.(7)(b)

40. Where the first grantee has assigned the estate *absolutely*, it is held, in New York and Connecticut, that he must show a damage to himself, by first making satisfaction upon his own covenant to the party evicted, upon the same principle by which the indorser of a note can sue a prior indorser, only after he has himself taken it up. But, in Massachusetts, it seems sufficient to allege that the assignor is himself

(1) Kingdon v. Nottle, 4 M. & S. 53.

(2) M'Crary v. Brisbane, 1 Nott & M'C. 104.

(3) Beardsley v. Knight, 4 Verm. 471.

(4) Catlin v. Hurlbert, 3 Verm. 403.

(5) De Chanmont v. Forsythe, 2 Penn. 507.

(6) Chase v. Weston, 12 N. H. 413.

(7) Tufts v. Adams, 8 Pick. 547.

(a) So, in Maine, since the Rev. Sts. c. 115, secs. 16, 17, the right of action upon the covenants of seizin, and a right to convey, passes to an assignee. Prescott v. Hobbs, 30 Maine, 345.

But the assignee must file at the first term, for the use of his grantor, a release of the covenants in his deed. Ib.

(b) Where the covenant of warranty is contained in a deed of mortgage, the measure of damages is the mortgage debt. Curtis v. Deering, 3 Fairf. 499.

answerable to the assignee. And the same doctrine was formerly held in New York. In New Hampshire, he must have done this, or obtained a release of the covenant.(1)(a) (*Supra*, ch. 86, sec. 51.)

40 a. A subsequent grantee of a portion of the land, may maintain an action, upon the covenant of warranty in the original deed. And the measure of damages is the proportional part of the purchase-money.(2)(b)

41. In New Jersey, upon a covenant by one "for himself and his heirs," that he will warrant, &c., to the vendee, "his heirs and assigns," the executors of the vendor are liable to an assignee of the vendee.(3)

42. In Massachusetts, if an administrator sell land of the intestate for payment of debts under a license, and covenant for the title, though *as administrator*, he is personally bound by the covenants.(c) So, where he covenants for himself, and the heirs of the intestate, *he alone* is bound.(4)

43. In Ohio, where executors covenant to warrant and defend, "as executors are bound by law to do," this is not a personal covenant.(5)(d)

44. Executors are liable for rent reserved upon a grant in fee, if expressly bound, though the land passes to heirs.(6)

45. The administrator of a lessee is *an assignee* within the terms *heirs and assigns*, and liable upon the covenants of the lease; especially if he enter and occupy.(7)

(1) *Kingdon v. Nottle*, 1 M. & S. 355; 4, 53; *Withy v. Mumford*, 5 Cow. 137; *Markland v. Clump*, 1 Dev. & Bat. 94; *King v. Kerr*, 5 Ohio, 156; *Boott v. Starr*, 1 Conn. 244; *Niles v. Sawtell*, 7 Mass. 444; *Kane v. Sanger*, 14 John. 89; *Claunch v. Allen*, 12 Ala. 159; *Chase v. Weston*, 12 N. H. 413.

(2) *Dougherty v. Duvall*, 9 B. Mon. 57.
(3) *Chapman v. Holmes*, 5 Halst. 20; *Townsend v. Morris*, 6 Cow. 123. (See *Lee v. Cooke*, 1 Wash. 306.)

(4) *Sumner v. Williams*, 8 Mass. 162; *Caswell v. Wendell*, 4 Ib. 108; *Duvall v. Craig*, 2 Wheat. 45; *Marvin v. Stone*, 2 Cow. 781; *Mitchell v. Hazen*, 4 Conn. 495. See *Worthy v. Johnson*, 8 Geo. 236.

(5) *Day v. Brown*, 2 Ohio, 346.
(6) *Van Rensselaer v. Platner*, 2 John. Cas. 17.

(7) *Montague v. Smith*, 13 Mass. 396.

(a) A deed being given, containing the covenant of seizin, and a mortgage of other property to secure this covenant; the purchaser made a mortgage of the land absolutely conveyed to him, and it was sold under a decree for foreclosure, and passed to successive purchasers. Held, the administrator of the covenantee could not maintain a suit in Chancery upon the covenant. *Ward v. Grayson*, 9 Dana, 287.

If a mortgagor, or his assignee, conveys with warranty, he is no longer entitled to redeem, nor is the grantee bound to redeem. And if the mortgage is foreclosed, the measure of damages, in an action by such grantee on the warranty, is the value of the land at the time of the eviction, with interest from that time, including the value of improvements, which the grantee may have made since the taking of the deed. *Elder v. True*, 32 Maine, 104.

A mortgagor cannot maintain an action on the covenants of warranty in his conveyance, while the debt secured by the mortgagee is unpaid, as the mortgagee is legal owner. *McGoodwin v. Stephenson*, 11 B. Mon. 21.

(b) In an action for breach of covenants in a deed, the pleading set forth, and issue was joined on a failure of title in the whole of the premises, and a general verdict returned for the plaintiff, but the breach proved was as to part only. Held, the verdict was erroneous, and the court refused to amend it from the judge's notes, so as to make it apply only to a part. *Parker v. Brown*, 5 N. H. 176.

(c) So, where a guardian covenants, *as such*, for the seizin of the deceased person, and his own seizin, in right of the minor; he is personally liable. *Whiting v. Dewey*, 15 Pick. 428.

(d) A grandfather, in consideration of natural love and affection, executed a deed to his grandchildren, which contained a covenant, that the grantor was seized of a good and indefeasible estate of inheritance, in the premises conveyed, free and clear of all incumbrance. The premises were subject to a mortgage, executed by a previous owner. Held, the grantees could not maintain an action against the executors of the grantor, to compel them to pay off that mortgage, out of the assets of their testator. *Duvoll v. Wilson*, 9 Barb. 487.

46. An administrator is liable, upon the covenant for quiet enjoyment, for damages incurred since, as well as before, the death of the intestate.(1)

47. With regard to the covenant against incumbrances, the general principles of law have been already stated. There are peculiarities, however, connected with this covenant, which require special notice.

48. It is said, equity will compel a vendor to remove an incumbrance upon the land. Whether, by merely calling upon the grantor to do so, the grantee entitles himself to recover full damages, *qu.*(2)

49. The most common class of incumbrances, are those which consist in a mere *charge* or *lien* upon the land, not interfering immediately with the grantee's possession, and which he can remove or extinguish by paying their definite pecuniary value.(a) In respect to these, the measure of damages, and the acts necessary to sustain an action, are as above stated, (secs. 2, 12.) But there are incumbrances of another kind, to which the rule mentioned is, from the nature of the case, inapplicable, which do interfere with the possession of, and cannot be removed by the grantee. Such are subsisting *easements* in or upon the land; as, for instance, a *highway*. In these cases, the mere existence of the in-

(1) *Hovey v. Newton*, 11 Pick. 421.

(2) 4 Kent, 476; *Funk v. Voneida*, 11 S. & R. 109.

(a) Such is *dower*, which is an *incumbrance*, though but *inchoate*, not a mere possibility or contingency. *Porter v. Noyes*, 2 Greenl. 22; *Jenks v. Ward*, 4 Met. 484; *Shearer v. Ranger*, 23 Pick. 283. But see *Fuller v. Wright*, 18 Pick. 403. Where, by the terms of a lease it is covenanted that the land is subject to the payment of a certain sum *per annum*, and no more, it is no breach that there was, at the time, a right of dower in the land, which afterwards became an incumbrance to the extent of the annual value of such dower. *Blair v. Rankin*, 11 Mis. 440.

An action cannot be sustained upon a covenant of *warranty*, on the ground that a claim of dower has been set up, and a gross sum assigned in full of dower; the decree to be enforced by execution, but not constituting any charge upon the land. *Johnson v. Nyce*, 17 Ohio, 66.

In an action upon the covenant against incumbrances, it is not sufficient for the plaintiff to show that he has been compelled to pay a gross sum to free the premises from dower; but he must show that the dower has been assigned, according to the statute, either by setting off by metes and bounds, or by assigning it as of the rents and profits. *Nyce v. Obertz*, 17 Ohio, 71.

So the grantor may show that the land embraced in his deed was not subject to the dower allotted out of it. *Enos v. Smith*, 7 S. & M. 85.

A, by deed, sold land in fee to B, with warranty. B made a similar conveyance and warranty to C. After C went into possession, dower was assigned out of the premises, in favor of the widow of A's grantor. Held that C, as assignee of A's covenant, might maintain an action against A, notwithstanding the record failed to show a writ of possession in behalf of the dower. *Leary v. Durham*, 4 Geo. 593. See *Barnett v. Gaines*, 8 Ala. 373.

It has been held, in Ohio, that where a deed contained covenants of lawful title, a right to convey, and of warranty, there being a subsisting right, but no assignment of dower, at the time; and the grantee was afterwards obliged to pay an annuity in lieu of dower; the covenants were not broken. *Tuite v. Miller*, 10 Ohio, 382. See *Clark v. Perry*, 30 Maine, 148.

So a *mortgage* is an incumbrance. *Bean v. Mayo*, 5 Greenl. 94. And an attachment. Thus, where A, having an attachment upon certain land, caused it to be set off on execution, and then conveyed it to B, with a covenant against incumbrances; and C, who had made a second attachment, caused the debtor's right of redeeming from A to be sold on execution, the officer giving a deed thereof; held, the second attachment was an incumbrance, for which A was liable to B upon his covenant. *Norton v. Babcock*, 2 Met. 510.

If a *judgment*, constituting a lien upon land, has been paid, it is no longer an incumbrance, though satisfaction has not been entered on the docket. *Espy v. Anderson*, 2 Harr. 308.

cumbrance is a good cause of action, and the measure of damages is the amount of injury or inconvenience thereby caused to the grantee.(1)(a)

50. It has been doubted, in New York, whether a highway is an incumbrance. But, in Massachusetts and Connecticut, it is held to be one. The effect of a highway, in increasing the value of the land, is undoubtedly a proper subject of consideration.(2)

51. A pre-existing right to take water from the land is, it seems, an incumbrance.(3)(b)

52. There seems to be still another and intermediate class of incumbrances, which are governed by still another rule of law, with regard to damages. This is where an incumbrance becomes changed into a title adverse and indefeasible. In such case, the plaintiff shall recover the consideration paid. He has no power to pay off the incumbrance, nor to enter upon the land; and it would be idle to require him to purchase it, in order to sue upon the covenant against incumbrances. The case would be one of *eviction*, except that the grantee never had possession. An instance, illustrative of these remarks, is that of a *judgment*, constituting a lien upon the land at the time of conveyance, and afterwards consummated by an execution sale.(4)(c)

53. Where there is a mortgage upon the land, and the mortgagee demands possession or payment of the covenant, and threatens a suit; this is a breach of the covenants *to defend*, and for quiet enjoyment; and an action lies thereupon, if the covenantee pay the mortgage, though he does not previously yield possession. But, if he pay it without previous demand, his only remedy is upon the covenant against incumbrances.(5)

54. Where, by reason of an antecedent mortgage, the grantee is evicted, or the whole premises are absorbed in the discharge of the mortgage debt; the damages are the same, as in case of eviction by reason of a total want or failure of title in the grantor. Although the grantee has the power, he is under no obligation, to discharge the incumbrance, for less than the value of the land. The grantor is bound to do it.(6)

55. But it is held, in Massachusetts, that where the grantee is evicted under a mortgage, the value of the land is not the measure of damages,

(1) *Hubbard v. Norton*, 10 Conn. 422; *Prescott v. Trueman*, 4 Mass. 630; *Harlow v. Thomas*, 15 Pick. 66; *Pritchard v. Atkinson*, 3 N. H. 335; *Jarvis v. Buttrick*, 1 Met. 480; *Herrick v. Moore*, 1 Appl. 313.

(2) *Whitbeck v. Cooke*, 15 John. 483; *Hubbard v. Norton*, 10 Conn. 422.

(3) *Mitchell v. Warner*, 5 Conn. 497.

(4) *Jenkins v. Hopkins*, 8 Pick. 349-50; *Duvall v. Craig*, 2 Wheat. 45.

(5) *Sprague v. Baker*, 17 Mass. 586.

(6) *Waldo v. Long*, 7 John. 173; *Bennet v. Ex'rs. &c.*, 13 John. 50; *Stewart v. Drake*, 4 Halst. 142.

(a) In Maine it seems to be held, that where the incumbrance is a claim of dower, after extinguishing it, an action lies upon the *warranty*. *Donnell v. Thompson*, 1 Fairf. 170.

(b) But, where A gave to B a deed of land "through which the water from the mill passes," with a covenant against incumbrances, the mill-owner has the right to cleanse the natural channel, and remove obstructions to the flow of water from the mill; and an entry for this purpose is no breach of covenant. *Prescott v. Williams*, 5 Met. 429.

(c) On the other hand, where one who has levied an execution upon land conveys it with a covenant against incumbrances, and the judgment debtor redeems; this is an eviction, and the measure of damages is the value of the land at the time of eviction, including permanent buildings, erected either by grantor or grantee, unless they are such as the debtor was bound to pay for on redeeming. So also where the grantee extinguishes the incumbrance by payment of money. *Norton v. Babcock*, 2 Met. 510.

because the plaintiff may redeem; and he might do it, even after recovering full damages, which would give him a double remedy.(1)

56. A grantor covenants to "indemnify the grantee from all demands, dues and damages, which might happen, &c., on account of a mortgage," &c. Held, a covenant for quiet enjoyment against the mortgagee, and that eviction was necessary to an action.(2)

57. Another important question as to the covenant against incumbrances is, whether the principle that an assignee cannot sue in his own name applies to this covenant. This seems to be rather a doubtful point.(a) If there is a subsisting incumbrance at the time of the original conveyance, this is a breach of the covenant in question, and it would seem, therefore, like the covenant of seizin, not to pass to an assignee. But, on the other hand, although a grantee may immediately maintain an action for breach of this covenant, he can recover only nominal damages, unless he has either removed the incumbrance, or been disturbed by the party who holds it. It follows, that such removal or eviction is the real and substantial cause of action, although in form it goes only to the amount of damages; and if this cause of action, therefore, arise after an assignee acquires the estate, although the incumbrance existed before, it would seem that he might sue, as upon the covenant of warranty, in his own name.

58. It is held, in Vermont, that the plaintiff may recover the amount paid to extinguish an incumbrance, though it be paid after the suit is commenced.(3)

59. In Connecticut, the covenant in question is not assignable. Hence it is not affected by a release of all covenants, made by an assignee of the land.(4)

60. In New Jersey, it is held, that the covenant against incumbrances is broken, by any subsisting incumbrance, at the time of making it; and that the right of action thereupon cannot be assigned, either at common law, or by statute. Hence the covenantee himself, after selling the land, may maintain an action upon this covenant. This case is compared to that of a horse, which is injured, and afterwards sold. For such injury the seller has, and the buyer has not, a right of action. It is said, that in New Jersey the covenant against incumbrances is not a distinct covenant, but part of the covenant of a right to convey; the language being, "the right and power to convey, free and clear," &c.; and that, for this reason, the English doctrines upon the subject are not applicable in that State. In England, the covenant in question is future.(5)(b)

61. In South Carolina, it is held, that the covenant against incumbrances does pass to an assignee, so that he can maintain an action thereupon, where the incumbrance, though existing at the time of the original deed, is not enforced till after the conveyance to the plaintiff.(6)

(1) *Tufts v. Adams*, 8 Pick. 547.

(2) *Van Slyck v. Kimbal*, 8 John. 198.

(3) *Potter v. Taylor*, 6 Verm. 676.

(4) *Davis v. Lyman*, 6 Conn. 240. (2 Justices dissent.)

(5) *Garrison v. Sandford*, 7 Halst. 261; *Chapman v. Holmes*, 5, 20.

(6) *M'Crary v. Brisbane*, 1 Nott & M'Cord, 104.

(a) Chancellor Kent states, generally, that it does. 4 Kent, 470-1.

(b) Probably, it is in general the case in this country, that the covenant in question is a distinct covenant.

62. In Massachusetts, the doctrine upon this subject has heretofore been somewhat unsettled. It has been distinctly decided, that the covenant in question is assignable, because *the breach continues, and the damages are enlarged*. But in a much later case, it is as distinctly *stated*, (and the point was directly in question, though not the most material one in the case,) that this covenant is not assignable; and this principle has, in a still more recent decision, been finally established as the rule of law; and the right of action upon such covenant therefore limited to twenty years *from the making of the deed*.(1)

63. With regard to the mutual bearing of the covenants in a deed upon each other, where the grantor had no good title when he conveyed, and the grantee had no possession under the deed, the cause of action is substantially upon the covenant of seizin, though the suit is nominally brought upon the covenant of warranty. Hence an assignee cannot sue upon the latter covenant. The defendant is not estopped to set up this defence.(2)

64. It is said, that where the same count in the declaration alleges a breach of the covenant of seizin, and that of warranty also, the count is *felo de se*.(3)

65. The assignee of a grantee brings an action against the grantor upon the covenant of warranty. Plea, that the defendant was not seized at the time of conveyance, and so the covenant of seizin was broken. The plaintiff takes issue upon this plea. Held, he might have replied an estoppel, but, not having done it, the jury might find the truth.(4)(a)

66. Declaration, upon a *special warranty*. Breach, that the defendant had *no right to sell and convey*. Held, a bad declaration.(5).

67. Land granted to the plaintiff being incumbered with a claim of dower, before any damage arising to him from this claim, he brings an action upon the covenant against incumbrances. Afterwards, having extinguished the claim, he sues upon the warranty. Held, the former suit was no bar to the latter.(6)

67 a. A deed with covenants of seizin, warranty, and against incumbrances, contained a condition that the covenants of warranty and against incumbrances should be restricted to a specific portion of the land. Held, the covenant of seizin was not thus restricted.(7)

68. The question has sometimes arisen, whether a plaintiff is estopped by some prior transaction from denying the defendant's seizin. A claimed land under the S patent, and B the same land under the K patent. A took a release from B, with a covenant of seizin. Held, A could not allege, as a ground of action, that the land did not lie in K,

(1) Sprague v. Baker, 17 Mass. 586; Tufts v. Adams, 8 Pick. 549; Clark v. Swift, 3 Met. 380. Otherwise, in Maine. Rev. St. 499; Ante, sec. 40, n.

(2) Stout v. Jackson, 2 Rand. 173; Slater v. Rawson, 1 Met. 450; Wheelock v. Thayer, 16 Pick. 68.

(3) Swett v. Patrick, 2 Fairf. 179; Hacker v. Storer, 8 Greenl. 228.

(4) Bartholomew v. Candee, 14 Pick. 167.

(5) Griffin v. Fairbrother, 1 Fairf. 91.

(6) Donnell v. Thompson, 1 Fairf. 170.

(7) Cornell v. Jackson, 3 Cush. 506.

(a) An assignee may sue upon the covenant of warranty, though the grantor had no title to the land, if possession has been taken under the deed. Beddoe v. Wadsworth, 21 Wend. 120.

If a deed be void, the grantee cannot recover upon the warranty. But if the deed was made by mistake as to the interests of parties, he may recover back the purchase-money. Mundy v. Vawter, 3 Gratt. 518.

or that B was not seized by reason of A's prior seizin under the S patent, which was the older one.(1)

69. The plaintiff brings a suit upon the covenant of seizin and a right to convey in a deed to him. It was proved that the defendant, by a prior deed, conveyed the land to the plaintiff, described as "all the lands, &c., devised to me by A, being all I own in the State of New York." On this deed was indorsed an unacknowledged deed of the plaintiff, reciting, that whereas the defendant had made another deed of the land, to be delivered to the plaintiff upon his assigning this conveyance to the defendant, he hereby re-assigns and conveys the premises to the defendant and his heirs. Held, the deed last named did not estop the plaintiff to deny the defendant's seizin and right to convey.(2)

70. Where a grantee, whose deed states a consideration, reconveys to his grantor, (instead of conveying to a third person,) with the same covenants made to himself, and the original grantor is evicted by a title paramount to that which he conveyed; he can maintain no action upon the covenants in the second deed, nor can he prove by parol evidence that he first purchased the land as agent for the grantee, and as such conveyed to him without consideration.(3)

71. But, where A conveys to B, and B concurrently mortgages back to A, both deeds containing covenants, B may have an action upon the covenant against incumbrances. The mortgagee is not *estopped*, because B may have removed the adverse title before mortgaging. For the same reason, his action is not barred upon the ground of preventing a circuitry of action. In these points of view, the two deeds are regarded not as *concurrent*, but *successive*. The mortgage is no bar to B's suit, for the additional reason, that the covenant in question is not assignable, and therefore did not pass back to A.(4)(a)

71 a. If, in an action on the covenant of seizin, the plaintiff's pleadings set forth, and the verdict finds, that the defendant had no seizin in fee in, or title to, any of the premises, and judgment is rendered

(1) *Fitch v. Baldwin*, 17 John. 161.

(2) *Smith v. Strong*, 14 Pick. 128.

(3) *Eveleth v. Crouch*, 15 Mass. 307. (See *Stevens v. Winship*, 1 Pick. 318.)

(4) *Hubbard v. Norton*, 10 Conn. 422.

(a) But it has been held in New York, that where A conveys to B with covenants, and B to C, taking a mortgage back, C cannot release the covenants of A, not having seizin. *Kane v. Sanger*, 14 John. 89. Conveyance, from A to B, with covenants. B gives bond to reconvey on demand, and in the meantime allow A to enjoy the land. Held, B could not sue upon the covenants. *Hatch v. Kimball*, 2 Shepl. 9. Upon the covenant against incumbrances in a deed of mortgage, only nominal damages are recovered. *Randall v. Mallett*, 2 Shepl. 51.

A takes a deed from B, giving a mortgage back. Both deeds contain the covenant against incumbrances. A brings an action against one who used a highway which passed over the land, upon B's representation that it was not a legal road; but fails in the suit. Held, A might bring an action against B upon his covenant, the mortgage not constituting a rebutter, and might recover the costs of the other suit. *Haynes v. Stevens*, 11 N. H. 28.

Where A conveys to B, with covenant of seizin, and B reconveys to A without covenant, B may, notwithstanding, recover against A for a breach. *Bank, &c. v. Mersereau*, 3 Barb. Ch. 528.

A conveyed to B, with covenants of seizin and warranty, and B, at the same time, mortgaged to A, by a deed containing the same covenants. A was not seized of all the land, and B was evicted from a part thereof, and brought an action against A on his covenant of seizin. Held, the action was maintainable, B's covenants not operating as a rebutter to his demand against A, to prevent circuitry of action. *Sumner v. Barnard*, 12 Met. 459.

thereon; the plaintiff will be estopped from setting up the deed against his grantor, if he should reclaim the land.(1)

71 *b*. In an action upon the covenant against incumbrances, the defendant cannot show that his deed was voluntary and fraudulent, for the purpose of proving a resulting trust in himself.(2)

72. It has been held, that a grantee can maintain no action, by reason of an incumbrance which he has himself assumed to pay. And it is competent to show, by parol evidence, what was the true consideration of the sale, without in any manner contradicting the deed.

73. A mortgages to B, and afterwards conveys to C, in consideration of C's paying the mortgage, and covenants against all incumbrances. C cannot sue A upon this covenant, on account of the mortgage, as, between A and C, the debt is paid. The effect is the same, as if A had conveyed to B with the same covenant, in satisfaction of the debt.(3)

74. But, where the conveyance is made subject to a mortgage, and it is agreed by parol at the time that the grantee shall pay such mortgage, and deduct the amount from the price of the land, and that the warranty, which is in terms without exception, shall not embrace the mortgage; such agreement is not binding upon an assignee. So it has been held, that to an action upon the covenant of seizin it is no defence, either at law or in equity, that the premises have been sold, and the grantee dispossessed, under a mortgage which the grantee assumed to pay, and subject to which he took the conveyance.(4)

75. It is the prevailing doctrine, that knowledge on the part of a grantee, of an existing incumbrance, is no bar to an action upon the covenant against incumbrances, or to relief in equity upon a bond for the price, as, for instance, where there is notoriously a highway over the land. Nor does the fact of a general warranty raise any presumption of notice of an adverse title. In New York, a contrary doctrine has been held. So it is held that a purchaser, who receives a deed with a full knowledge of the title and certain pretended claims, cannot withhold a part of the purchase money on account of them, but must seek redress on the warranty, should he suffer damage by the adverse claim.(5)(a)

76. The covenant of seizin in fee, in a conveyance by tenant for life of all his interest in the land, does not enlarge the words of the grant, so as to pass a fee to the grantee by disseizin.(6)

77. It is held, that where a conveyance is itself void, the covenants

(1) *Parker v. Brown*, 15 N. H. 176.

(2) *Henderson v. Henderson*, 13 Mis. 51.

(3) *Watts v. Welman*, 2 N. H. 458; (*Campbell v. Shrim*, 3 Watts, 60; *Allen v. Lee*, 1 Smith, 12; *Copeland v. Copeland*, 30 Maine, 446.

(4) *Snydon v. Jones*, 10 Wend. 180; *Bingham v. Weiderwax*, 1 Comst. 509.

(5) *Cresson v. Miller*, 2 Watts, 272; *Harlow v. Thomas*, 15 Pick. 66; *Stockton v. Cook*, 3 Munf. 68; *Townsend v. Weld*, 8 Mass. 146. See *Prescott v. Williams*, 5 Met. 429; *Stansbury v. Taggart*, 3 McL. 457.

(6) *Hurd v. Cushing*, 7 Pick. 169.

(a) Covenant to give "a good sufficient general warranty deed." Part of the price was paid, and a note given for the balance. The vendor brings a suit upon the note, and the vendee a bill for specific performance, the vendor having tendered a deed, reserving a right in a third person to dam up a stream which ran through the land, which right was known to the vendee at the time he purchased. Held, the facts furnished a good defence to the suit on the note, and sustained the bill in equity, notwithstanding the knowledge on the part of the vendee. *Morgan v. Smith*, 11 Illin. 194.

contained in it are void also. Thus, where an attorney, empowered to make a lease, leases in his own name, a covenant to pay rent to the principal is void. So, (as has been seen,) where a grantor has not *good right to convey*, according to his covenant, if the grantee reconvey to a third person, as the land does not pass, the assignee cannot sue upon the covenants in the original deed.(1)

78. But, where a deed is ineffectual to pass a title, as being prohibited by the laws of the state in which the land lies; if the covenantee has not wilfully violated those laws, he may maintain an action upon the covenants in such deed, either in that or any other state.(2)

79. In a late case, it is said, that where a deed is void, the dependent covenants are also void, but not those which are *collateral and independent*; as, for instance, the covenants of a sheriff, in conveying an equity of redemption, that he has observed the legal requisites. Such covenant is valid, though the deed be void.(3)

80. A grantor cannot show, in defence to an action upon the covenant of warranty, that he assigned to the grantee a judgment, which the latter agreed to hold as his sole security. But he may prove that the plaintiff has by his neglect lost the lien of the judgment.(4)

80 *a*. A receipt not under seal, although in full of all demands of every kind, name, and nature, cannot be set up as a defence to an action, brought on the covenants in a deed not apparently referred to in the receipt; for, covenant by deed must be discharged by deed.(5)

80 *b*. The defendants conveyed to the plaintiff, by deed of October 7, 1845, with a covenant against incumbrances. The premises were then subject to a lease, dated September 20, 1844, for three years, at an annual rent of \$575, under which the lessee was in possession. At the time of the conveyance, the plaintiff mortgaged to one of the defendants, to secure \$10,500 in five years, with annual interest at the rate of 5 1-2 per cent. from October 7, 1845; the mortgagee giving the plaintiff a written promise, that, till September 1, 1847, the interest on the mortgage should be \$520, annually, notwithstanding the agreement for 5 1-2 per cent.; and that till September, 1847, he would pay the taxes on the estate. In an action on the covenant against incumbrances, held, the agreement as to interest and taxes did not constitute an accord and satisfaction for the incumbrance of the lease.(6)

80 *c*. C recovers judgment in Maryland against T, on his covenant binding his heirs. T dies, leaving no estate in Maryland, but leaving real estate in Virginia. The judgment does not merge the covenant, so as to exonerate the heirs from liability thereon, in respect to real assets descended in Virginia.(7)

81. Where the clause containing a covenant of seizin is blank as to the name of the covenantor, the covenant is invalid.(8)

82. In connection with the subject of *warranty* and *covenants*, may be briefly considered the title *by estoppel*. *Estoppel* can hardly be regarded as a distinct mode of acquiring title to real property, because it is not by itself a transfer or assurance, but depends, as a secondary in-

(1) *Frontin v. Small*, *Ld. Ray*, 1418; *Str.* 705; *Bickford v. Page*, 2 *Mass.* 460.

(2) *Phelps v. Decker*, 10 *Mass.* 267.

(3) *Wade v. Merriam*, 11 *Pick.* 280.

(4) *Collingwood v. Irwin*, 3 *Watts*, 306.

(5) *Heath v. Whidden*, 29 *Maine*, 108.

(6) *Batchelder v. Sturgis*, 3 *Cush.* 201.

(7) *Beall v. Taylor*, 2 *Gratt.* 532.

(8) *Day v. Brown*, 2 *Ohio*, 346.

cident, upon other direct alienations, although giving to them a peculiar and distinctive operation. *Estoppels* are of various kinds, differing both with regard to their subject matter, and the means by which they are created. The plan of the present work limits our inquiry to estoppels relating to real estate, and created for the most part by deeds or certain clauses therein. The *covenant* or *warranty* in a deed is the clause which is usually held to work an estoppel; and therefore the present seems to be an appropriate connection in which the general subject may be considered.

83. It has been seen in a former chapter, that the technical principles of the ancient *lineal* and *collateral* warranty are for the most part obsolete in this country. So far, however, as a warranty has the effect of an *estoppel* or *rebutter*, it would seem still to retain its original force. This operation of a warranty was illustrated in a recent case in Massachusetts.

84. A father, seized in fee, conveyed with warranty to A, and died, leaving a daughter, his sole heir, with assets by descent, to a greater value than the land. She became the wife of B, who had a paramount title to the land. Held, B was estopped to assert this title, because A might bring a cross action against him and his wife upon the warranty; that, if he were a *purchaser*, for the valuable consideration of marriage, of all that came to the wife, it was still *cum onere*, and he was as liable to respond to the warranty of her ancestor, as he would have been to her own warranty. Whether the same principle would apply, if the daughter were not *sole* heir, *qu?*(1)

84 *a*. So, the grantor in a deed, containing covenants of warranty, is estopped from claiming a resulting trust in the premises, for his own benefit.(2)

85. An estoppel may be by record, or by recital or admission in a deed. So, merely acting under a deed may be an estoppel. It is the maxim of the law, that no man shall allege contrary to what he has once admitted or agreed to.(3)(*a*)

86. Only a sealed instrument can be *pleaded* by way of estoppel.(4)

87. A resolve of the legislature may operate as an estoppel; as, for instance, with regard to boundaries. So, where the legislature grants land in fee, with warranty, to an alien, it is estopped to claim the land by escheat from the alien heirs of such grantee.(5)(*b*)

(1) *Bates v. Norcross*, 17 Pick. 14. See *Wade v. Lindsey*, 6 Met. 407.

(2) *Rathbun v. Rathbun*, 6 Barb. 98.

(3) Co. Lit. 352 a; *Bonaffé v. Woodbury*, 12 Pick. 423; *Kimball v. Blaisdell*, 5 N. H. 533; *Hamilton v. Elliot*, 4, 182; *Sinclair v. Jackson*, 8 Cow. 543. (See *Bursley v. Hamilton*, 15 Pick. 40.) *Whitney v. Holmes*, 15 Mass. 152; *Bean v. Parker*, 17, 591; *Bank,*

&c. v. Mersereau, 3 Barb. Ch. 528; *Perry v. Calhoun*, 8 Humph. 551. See *Jarnigan v. Mairs*, 1 Humph. 473.

(4) *Davis v. Tyler*, 18 John. 490; *Gerrish v. Proprs. &c.*, 26 Maine, 384.

(5) *Com. v. Pejepscut, &c.*, 10 Mass. 155; *Enfield v. Permint*, 5 N. H. 280; *Com. v. Heirs, &c.*, 3 Pick. 224.

(*a*) Where the original boundaries have been destroyed, or are unknown or doubtful, the owner is estopped by a survey made by him in reasonable conformity with his title deeds. Whether a *feme covert* would be, *qu?* *Yarborough v. Abernethy*, 1 Meigs, 413.

If the parties know the true line, but verbally agree upon another, the agreement is void, and passes no title. *Ib.*

(*b*) But it has been held, that estoppels do not bind the sovereign or State, or their assignees. *Candler v. Lunsford*, 3 Batt. 407.

88. A grantor is estopped to deny that he granted or had a good title. But the grantee may deny the grantor's seizin. In a suit against a mortgagor for the land mortgaged, he is estopped to deny that he had a title when he mortgaged, or to set up title in a stranger.(1) But, where a mortgage refers to a note, the mortgagee is not estopped to deny the existence of such note.(2)

89. An executory covenant does not estop the covenantor from bringing an action in violation of it.(3)

90. Only parties or privies are bound by, or can take advantage of, an estoppel, unless it be by record. Recitals estop privies in blood, in estate, or in law.(4)(a)

91. An estoppel affecting the title to land, may be given in evidence.(5)

92. Where the truth appears by an instrument which would otherwise estop, there shall be no estoppel.(6)(b)

93. Estoppels are construed strictly; and not allowed as instruments of fraud, but only to prevent injustice. They are said to be odious, more especially in equity. On the other hand it has been remarked, that the doctrine of estoppel aids much in the administration of justice, and becomes odious only when misunderstood or misapplied.(7)

94. In reference to the most important application of the principle of estoppel, the general rule is thus stated. A conveys to B, and afterwards purchases the land from C. If he gains any title by such purchase, it enures to the use of B, or of any one claiming under him.(8)(c)

(1) *Wilkinson v. Scott*, 17 Mass. 249; *Small v. Procter*, 15, 495; *Barker v. Harris*, 15 Wend. 615.

(2) *Parker v. Parker*, 17 Mass. 370.

(3) *Gibson v. Gibson*, 15 Mass. 106.

(4) *Jackson v. Parkhurst*, 9 Wend. 289; *Braintree v. Hingham*, 17 Mass. 432; *Jackson v. Brinckerhoff*, 3 John. Cas. 103; *Sinclair v. Jackson*, 8 Cow. 543; *Griffin v. Richardson*, 11 Ired. 439; *Massure v. Noble*, 11 Illin. 531; *Callow v. Jenkinson*, 5 Eng. L. & Equ. 533; *Averill v. Wilson*, 4 Barb. 180.

(5) *Adams v. Barnes*, 17 Mass. 365. A case presenting a very clear and accurate distinction, between those cases where estoppel must be *pleaded*, and those in which it may be merely *proved*.

(6) *Sinclair v. Jackson*, 8 Cow. 543; *Croade v. Ingraham*, 13 Pick. 35; *Warner v. Leland*, 2 Barb. 613.

(7) 13 Pick. 35; *Comstock v. Smith*, Ib. 121; *Hubbard v. Norton*, 10 Conn. 433; *Jones v. Sasser*, 1 Dev. & B. 464; *Black v. Tucker*, 12 Verm. 44; *Pierrepoint v. Barnard*, 5 Barb. 364.

(8) Ark. Rev. St. 188-9; *Adams v. Frothingham*, 3 Mass. 355; *Harmer v. Morris*, 3 M'L. 48; *Jackson v. Hoffman*, 9 Cow. 271; *Jackson v. Murray*, 12 John. 201; *Harmer v. Morris*, 1 M'L. 48; *Gough v. Bell*, 1 N. J. 156; *Pike v. Galvin*, 29 Maine, 183; *Bank, &c. v. Mersereau*, 3 Barb. Ch. 528.

(a) The surviving partner of a firm, which had been engaged in gambling, and purchased and used a house for gambling purposes, cannot impeach the title of a grantee of the other partner, on the ground that the house is unlawfully used; being estopped by his privity with the grantor. *Watson v. Fletcher*, 7 Gratt. 1.

(b) Trespass for attempting to use a water-privilege, mortgaged to the plaintiff, with general warranty, by the defendant. In a case stated, it was agreed, that the defendant had no title. Held, though he would be estopped by his deed to deny that the plaintiff acquired a title, yet, as the above fact was agreed by the parties, he might avail himself of it to defeat the action. *Wheelock v. Henshaw*, 19 Pick. 341.

(c) Including his heirs. Whether his devisees, *qu.* *Logan v. Moore*, 7 Dana, 76. *Upshaw v. McBride*, 10 B. Mon. 202.

A vendor, acquiring a subsequent title to property which he had sold without title, must convey it to the vendee; but, if the heir acquire a subsequent title, he cannot be compelled to convey it, or to answer in damages, except so far as he may have *assets*. *Upshaw v. McBride*, 10 B. Mon. 202.

Where one of the heirs to an estate is appointed an executor, with power to sell the real property for certain specified purposes, and he makes a conveyance not within the scope of

95. Considered in this particular point of view, upon the subject of estoppel, the ancient authorities are obscure and somewhat contradictory. In 2 Hen. VI, 2, it is said, that a stranger cannot say "*riens passa per le fait*;" but the court were divided. In 2 Hen. IV, 21 and 22, it is said, "a stranger shall not plead *non est factum*," but may plead *riens passa*, &c. In a late case it is said, the latter of these *dicta* is probably the law. It is certainly a common practice (in Massachusetts) to plead that the grantor was not seized. Whether this plea is confined to a disseizin of the grantor, or applies to other cases of an ineffectual deed, is doubtful.(1)

96. The question has often been raised, whether an estoppel binds the grantor himself alone, or any subsequent purchaser from him also. Upon this point the law has been thus stated.

97. Where an estoppel *works on the interest of land*, it passes with the land. Ejectment lies upon a mere estoppel. An estoppel is not a *mere conclusion*, but may pass an interest and constitute a title from the moment of the grantor's acquiring one. All who come in *in the post* are bound by an estoppel, though claiming under another title. The grantee's right is not limited to a claim by the grantor or his representatives, but he may defend against trespassers or disseizors. A distinction is taken between this case and that of *maintenance*, or the transfer of a *pretended title*. In the latter case, there is an adverse seizin in a stranger; here, a claim exists only against a vendor of land who has been paid the consideration, and those claiming under him, and mere usurpers.(2)

98. In New York it is said, that where one acquires a title after making a conveyance, he is estopped, "and the stranger to whom he sells will be equally estopped." Whether this is a technical estoppel, *qu.*? In New Hampshire, a subsequent grantee with no title is estopped.(3)

99. Though a warranty bars the heir and his issue, it does not estop a purchaser under a judgment against the heir, recovered during the life of the ancestor, and before the deed from which the estoppel would arise.(4)

100. Lord Kenyon inclined to the opinion, that a subsequent pur-

(1) *Somes v. Skinner*, 3 Pick. 57-8.

(2) *Trevivan v. Lawrance*, 1 Salk. 276; *Fairbanks v. Williamson*, 7 Greenl. 96; Co. Lit. 352 b. See 1 Rolle, 868; *Terrett v. Taylor*, 9 Cranch, 43; *Mason v. Manchester*, 9 Wheat. 454; *Jackson v. Matsdorf*, 11 John. 97; *McCrackin v. Wright*, 14, 194; *McWilliams v. Nisly*, 2 S. & R. 515; *Somes v. Skinner*, 3 Pick. 59-60. (See *Smith v. Stapleton*, Plow. 434; 4 Co. 53-4; Co. Lit. 47 b. n. 307.) *Bowers v. Porter*, 4 Pick. 198; *Coe v. Tal-*

cott, 5 Day, 88; *Middlebury, &c. v. Cheney*, 1 Verm. 336; *Gardner v. Johnston*, 1 Peck, 24; *Douglass v. Scott*, 5 Hamm. 194; *White v. Patten*, 24 Pick. 324; *Lunsford v. Alexander*, 4 Dev. & B. 42; *Lawry v. Williams*, 13 Maine, 281; *Kennedy v. M'Cartney*, 4 Port. 141.

(3) *Jackson v. Bull*, 1 John. Cas. 90-1; *Wark v. Willard*, 13 N. H. 389.

(4) *Jackson v. Bradford*, 4 Wend. 619.

his authority under the will; it would seem that he might perhaps be estopped from denying that his own interest in the premises passed by the deed. *Allen v. De Witt*, 3 Comst. 276.

Where one entitled by an entry only conveys the land, and afterwards takes out a patent; the title is good. *Thruston v. Masterson*, 9 Dana, 233. The rule stated in the text applies to *equitable titles*. *Avery v. Dufrees*, 9 Ohio, 145; *Burchard v. Hubbard*, 11, 216; *Fortescue v. Satterthwaite*, 1 Ired. 506; *Stow v. Wyse*, 7 Conn. 214. A confirmation under the act of Congress of 1836 to an original claimant and his legal representatives, enures by estoppel to his assignee. *Wright v. Rutgers*, 14 Mis. 585.

chaser was bound by an estoppel, though the deed contained no warranty; but considered the point as doubtful.(1)

101. It has been held in Massachusetts, that where a grantor, supposing that his father had only a life estate, intended to convey a vested remainder; but was in fact merely heir apparent to the estate; nothing passed by the deed. It did not appear, however, that the deed was with warranty; nor was the question of estoppel raised.(2)

101 *a*. Where a party not owning land conveys it by a warranty deed, a title subsequently acquired by him enures at once to the benefit of his grantee through the operation of the covenant of warranty, by way of estoppel, but not to the benefit of a party claiming under an attachment prior to the deed, and a levy duly made; who shall be postponed in such case to the claimant under the deed.(3)

101 *b*. In 1832, A, owning land, gave a bond to convey the same to B on payment of certain notes. B conveyed, by warranty deed, a part thereof, which came by similar deeds, to C, who conveyed also by a warranty deed, dated September 5, 1835, recorded October 11, 1839, to D. By deed given to B, August 16, recorded August 18, 1836, A conveyed to B. A creditor of C attached the land, May 14, 1836, and afterwards levied his execution thereon. Held, B's title, acquired by A's deed, enured at once to the benefit of his grantee, and, through his grantee, at once to the benefit of those claiming under him by successive deeds of warranty, through the operation of the warranties, by way of estoppel, and not to the benefit of the attaching creditors; so that the title vested in D unaffected by the attachment and levy.(4)

102. It is the prevailing, and probably well settled doctrine, though there are cases which favor a contrary opinion; that a deed cannot operate as an estoppel, unless it contains covenants of general warranty; so far at least as the passing of a subsequently acquired title is concerned. Thus it is held, in Massachusetts, that a warranty against all claiming under the grantor *refers to the estate or title sold*, not to the land, and applies only to claims *existing at the time*, not to those afterwards acquired; and hence that it creates no estoppel. So, in Connecticut, it is said, a deed of release contains no warranty, and works no estoppel.(5)(*a*)

102 *a*. A deed, whereby the grantor grants, bargains, sells, aliens, enfeoffs, assures, releases, and confirms to the grantee, and to his heirs and assigns forever, a tract of land lying within certain boundaries, (excepting parts previously sold in fee, or leased in fee, or for life, by the grantor and his ancestors,) with the reversions, remainders, rents, issues, services, and profits, of the described premises, and also all the

(1) Goodtitle *v.* Morse, 3 T. R. 365.

(2) Davis *v.* Hayden, 9 Mass. 519.

(3) Crocker *v.* Pierce, 31 Maine, 177.

(4) *Ib.*

(5) Comstock *v.* Smith, 13 Pick. 116; Jackson *v.* Wright, 14 John. 193; Dart *v.* Dart, 7 Conn. 250; Kinsman *v.* Loomis, 11 Ohio, 475; Wright *v.* Shaw, 5 Cush. 56; Pike *v.* Galvin, 29 Maine, 183.

(*a*) In Missouri, a statute provides, that if one convey, and purport to convey in fee, without having the legal estate, but afterwards acquire it; such estate immediately passes to the purchaser. Mis. Rev. St. 119. The act does not apply to a quit-claim deed. Boge *v.* Shoab, 13 Mis. 365. A similar act in Arkansas. Rev. St. 188-9. A releasee without covenants, is not estopped from setting up an elder title than the releasor's. Ham *v.* Ham, 2 Shepl. 351.

estate, right, title, interest, property, possession, claim, and demand of the grantor, of, in, and to, the same, to have and to hold the said tract of land, excepting as before excepted, to the grantee, his heirs and assigns, to their use and behoof forever, in as full and ample a manner as the same now is, or had been, had or enjoyed by the grantor or his ancestors, or lawfully might, if this deed were not made, be had and enjoyed by the grantor, his heirs or assigns, with a covenant that the tract of land described, excepting as before excepted, is free and clear, and shall be held and enjoyed by the grantee, his heirs and assigns, according to the true intent and meaning of the deed, freely and clearly acquitted and discharged of and from all incumbrances and charges, other than leases given by the grantor or his ancestors, and one mortgage executed by the grantor; the grantee covenanting to pay off the mortgage, and to execute leases previously agreed to be made by the grantor; estops the grantor from setting up a title afterwards acquired from his ancestor.(1)

102 *b.* A executed a deed to B, by which he sold all his claim in and to a certain piece of land called the C place, which was conveyed by C to A; which deed contained the following clause: "And the said A, for himself and his heirs, the said right, as it was vested in A, to the said B and his heirs, against himself and his heirs, will warrant and defend. It is fully understood that, if said title should prove insufficient in law or equity, the said A and his heirs are to have no recourse, he knowing the whole circumstances." Held, A was not estopped by the deed from purchasing another adversary title to said land, and setting it up against B.(2)

102 *c.* Where A, who had not the fee in certain lands, executed a deed to B, purporting to "grant, sell, and convey" all his "right, title, and interest" therein, with a *habendum* clause to B, "his heirs and assigns forever, with all the privileges and appurtenances," &c., and A subsequently obtained a patent for the premises from the United States; held, under the statutes of Illinois, the fee would enure to B and his assigns.(3)

102 *d.* Where A, who had joined with other parties in conveying certain lands, with a special warranty on his part, against all parties claiming under him, sought to be substituted in the place of one interested in the land, whose debts he had paid; held, A was estopped by his deed from setting up any title to the land, and this estoppel ran with the land into the hands of the owner.(4)

102 *e.* Where a defendant in ejectment has taken a quit-claim deed from a person other than the plaintiff; he may question the title of his grantor.(5)

103. There is no estoppel by warranty, where such warranty has any subject to operate upon; that is, where any estate passes to the grantee, though less than that which is warranted. Thus, the grantor is estopped to deny that he had *any title*, but not that he had anything

(1) *Van Rensselaer v. Kearney*, 11 How. U. S. 297.

(2) *Wynn v. Harman*, 5 Gratt. 157.

(3) *Frisby v. Ballance*, 2 Gilm. 141.

(4) *Fitzhugh v. Tyler*, 9 B. Mon. 559.

(5) *Bigelow v. Finch*, 11 Barb. 498.

more than an interest by possession and improvements, subject to a paramount title in another.(1)(a)

104. The covenants of seizin and a right to convey do not estop the grantor from setting up an after-acquired title against the grantee. Otherwise with a covenant, that neither the grantor nor his heirs shall make any claim to the land; though this is not technically a warranty.(2)(b).

105. The principle of estoppel does not apply, where a grantee with warranty has recovered judgment and satisfaction thereupon. A *warrantor* can make no averment against his deed; but a *warrantee* may: and such averment may then be supported by a record, which is of higher nature than a deed.(3)

106. Where an occupant of land claims under a warranty deed from a third person, he is estopped to allege that he holds in common with the plaintiff.(4).

107. It is said in New York, that there can be no technical estoppel by a conveyance under the statute of uses. This remark was applied to a common deed of bargain and sale, it seems, and can hardly be considered as reconcileable with the prevailing doctrine of estoppel by warranty; a warranty being usually inserted in deeds of bargain and sale.(5)

108. Conveyance of land, bounding *by the river*. The grantee subsequently acquires a title by disseizin to a lot extending beyond the thread of the river. Held, he was not estopped to claim this lot.(6)

109. Where A conveys to B, in order that he may immediately convey to C, which he accordingly does, but B before the deed to him has conveyed to D; the deed from A to B will not enure to the benefit of D.(7)

110. Where title under a deed is set up, not by one claiming under

(1) Jackson v. Hoffman, 9 Cow. 271; Comstock v. Smith, 13 Pick. 116.

(2) Allen v. Sayward, 5 Greenl. 227; Fairbanks v. Williamson, 7 Greenl. 96.

(3) Porter v. Hill, 9 Mass. 336.

(4) Siglar v. Van Riper, 10 Wend. 414.

(5) Jackson v. Brinckerhoff, 3 John. Cas.

104.

(6) Kinsell v. Daggett, 2 Fairf. 309.

(7) Runlet v. Otis, 3 N. H. 167.

(a) So, it is said, a warrantor is not estopped to claim under a title growing out of the one warranted. Berthelemy v. Johnson, 3 B. Monr. 93.

(b) The deed of a *feme covert* will not, by way of estoppel, bind her subsequently-acquired interest in the land. But, in England, a fine levied by husband and wife will bar her contingent interest. Jackson v. Vanderheyden, 17 John. 167; Helps v. Hereford, 2 Barn. & Ald. 242.

A, having only an equitable title, conveyed, without warranty, to B, in trust for C, afterwards gained a legal title, and sold to D, with warranty. Held, the legal title did not vest in B, in trust for C. Doswell v. Buchanan, 3 Leigh. 365. A, having contracted to sell land, to which he had a mere equitable title, to persons in possession, mortgaged the land, and afterwards obtained the legal title. The mortgage being recorded, A conveyed to purchasers without notice, who paid part of the price and mortgaged for the rest. Held, the first mortgagee obtained only an equitable lien, which he could enforce only for such part of the price as remained due from the purchasers, when actually, and not merely by the registry, notified of the mortgage. Farmers, &c. v. Maltby, 8 Paige, 361. The purchasers could not be bound to search the registry of deeds, before the mortgagor himself acquired a legal title. *Ib.*

A subsequent grantee in fee, of premises previously leased for life, is bound by the covenant for quiet enjoyment in the lease, and cannot institute any proceedings, incompatible with such enjoyment; he, therefore, cannot maintain against a third person proceedings to recover possession of the land, the effect of which would be to remove the tenant for life. Per Willard J. Buck v. Binninger, 3 Barb. 391.

such deed, but as an outstanding title in a stranger, not connected with the defendant, the grantee may disprove delivery. There is no estoppel.(1)

111. A recital in a will is an estoppel to those who claim under such will.(2)

112. A will contained the following recital: "Whereas I have conveyed to my son A my lands at B, and to my son C my lands at D," and proceeded to devise all the rest of the testator's real estate to A and C, and to E his daughter. Held, A was estopped, as heir, to deny the conveyance to C, or that it was a conveyance in fee.(3)

113. A deed of *partition* estops the parties and those claiming under them.(4)(a)

114. A grant of land, held adversely to the grantor, to a third person, does not operate as an estoppel in favor of the tenant in possession.(5)

115. It has been recently held by the Supreme Court of Massachusetts, that, although the acceptance as well as execution of a deed may operate as an estoppel, yet such acceptance of a quit-claim deed by two grantees does not estop either from denying, as between themselves, that any thing passed by the deed; but only that, if anything did pass, they took as tenants in common.(6)

116. In another hearing of the same case before the Circuit Court of the United States, the following were the facts disclosed, and some of the points decided.

117. On or about June 13, 1823, S F, as guardian of his children, conveyed lands to L in fee. In May, 1825, L conveyed the land, being incumbered, to P by quit-claim deed, upon a secret parol trust for L. May 6, 1826, L and wife and P conveyed by quit-claim to W and F, for the consideration of \$2000, as stated in the deed, and W and F gave back a bond for \$10,000 to L, reciting that L had made such deed, and agreeing to reconvey to him upon his paying, within five years, their expenditures for improvements, and in removing incumbrances. W and F concurrently leased a part of the land to L for a nominal rent, for five years, unless it should be redeemed according to the bond. On or before May 13, 1831, the heirs of S F claimed the land, upon the ground that the guardian's sale was informal and void. Soon after, A and B, the plaintiff and defendant, agreed by parol jointly to purchase L's title, and extinguish the claims of W and F, and of said heirs; which agreement was never abandoned. May 13, 1831, A and B took a quit-claim deed from L, and an assignment of the bond of W and F. July 27, 1831, W and F quit-claimed to B alone. A brings a bill in equity against B, and C, to whom B had conveyed the land, to set

(1) Jackson v. Perkins, 2 Wend. 308.

(2) Denn v. Cornell, 3 John. Cas. 174.

(3) Ib.

(4) Jackson v. Hasbronck, 3 John. 331.

(5) Jackson v. Brinckerhoff, 3 John. Cas. 101.

(6) Flagg v. Mann, 14 Pick. 467.

(a) A being seized in fee, but supposing himself to be a tenant in common, applied to the Orphans' Court, (which had power only to sever possession, not to convey title,) in his petition stating that he was so seized as tenant in common. A partition was had, and afterwards one of the other alleged tenants in common conveyed the portion assigned to him to B. After A's death, his heirs brought ejectment against B. Held, that they were not estopped from recovering by the proceedings in the Orphans' Court. Den v. Baldwin, 1 New Jersey, 395.

aside such conveyance, and obtain a conveyance to A upon his paying one half the sums paid in perfecting the title. (Among other points decided,) held, that B, deriving his title jointly with A from the purchase of L, could not set up the outstanding title of the heirs, to prevent A's equitable claim to a share of the land under the joint purchase; that, although B was not technically *estopped* at law, yet equity would not allow him to set up the title of the heirs, A and B having made their mutual arrangement for the purpose of avoiding the effect of such title; that W and F, and all claiming under them, were estopped, at least in equity, by their bond, to deny that the deed to them passed only the right of L; and, as against B and C, a purchaser from him with notice, relief was granted, as prayed for.(1)

118. It is said, that where one deed recites another, there is no estoppel, unless both are made *in one right*. But no such limitation seems to be adopted, with regard to the general principle of estoppel by a deed made before the grantor acquires a title. Thus, if an heir, being also executor, conveys in the latter capacity, land of which the testator died disseized, he is estopped to claim the same land as heir, though the deed purported to convey only the right of which the testator died seized. So, where a guardian sold land of his ward under a license, covenanting that he was duly authorized; held, he was estopped to claim the land under a deed made to him individually.(2)(a)

119. A collector of taxes conveyed by quit-claim deed, upon a tax sale, all the right he had *by virtue of his power or interest*. He himself owned a paramount title to the land. Held, he was estopped to assert this title.(3)

120. A case analogous to that of a technical estoppel, though not standing precisely upon that ground, is where one conveys his interest in land, to which at the time he has a general and undefined title, and subsequently acquires certain specified lands, in completion of his former right. These lands will immediately vest in the grantee.

121. Where one, having a contract for a grant of 8000 acres of land from the State, upon completion of certain roads, to be laid off in any lands through which such roads might pass, before any survey or conveyance from the State, transferred an undivided third of this quantity of land, and afterwards took a deed from the State; held, both the grantor and any one claiming under him were estopped to claim such third part.(4)

122. So, where a joint proprietor of a township, entitled to a certain number of acres, conveys his interest before any location is made to him; a subsequent location enures to the benefit of the grantee, and vests a portion of the land in him in severalty.(5)

122 a. In general, a *purchaser* of land cannot dispute his vendor's title. Otherwise, where the purchaser is in possession, claiming title, not having originally entered under the vendor; as where he was deceived in

(1) *Flagg v. Mann*, 2 Sumn. 487.

(2) *Poor v. Robinson*, 40 Mass. 131; *Heard v. Hall*, 16 Pick. 457.

(3) *Brown v. Wheeler*, 1 Root, 236.

(4) *Fairbanks v. Williamson*, 7 Greenl. 96.

(5) *Burghardt v. Turner*, 12 Pick. 534.

(a) So one who acts as appraiser, in the extent of an execution, may be estopped to set up a title against the execution purchaser, though not to deny that anything passed by the extent. *Morse v. Child*, 6 N. H. 521.

the purchase, though he entered under it. So, it seems, where the parties were under a mutual mistake as to the vendor's right of selling.(1)

122 *b*. A had the legal title and possession of certain land; B, the equitable title. In a suit concerning the land, B obtained a decree, but the suit was compromised by B's giving A a deed of the land, reciting that it was the land referred to in the decree. Held, A was not estopped by the deed, or his relation to B, to deny B's title.(2)

122 *c*. One claiming title under a sheriff's sale cannot set up against another, claiming a remainder after the life-estate of the execution defendant, that the remainder-man witnessed to a deed of the execution defendant, conveying all his interest to the execution plaintiff, not claiming under the deed, nor interested with any right under it, he cannot set it up.(3)

122 *d*. Conveyance of a lot of land, formerly a street, with the house standing thereon. The grantor's interest was afterwards sold on an execution against him, and a tenant of the execution purchaser put in possession. In ejectment brought by the former purchaser against the execution purchaser, held, both parties were estopped to deny the grantor's title, under whom they both claimed.(4)

123. It is a well established rule of equity, that where one having title acquiesces in the disposition of his property, for a valuable consideration, by a person pretending to title and having color of title, he shall be bound by such disposition, and shall not afterwards be allowed to set up his own title against the purchaser. And so it has been held, that if one having title stands by, while another purchases from a third person claiming title, and does not forbid the purchase, or disclose his own title, he shall be bound. *A fortiori* if he encourages the purchase; or a person sells his own property, as the property of another, to a *bona fide* purchaser for a valuable consideration. (See Vol I, ch. 36.)

124. The above rule does not appear to have been adopted or considered as a rule at common law, excepting in Pennsylvania. But in some respects, and to a certain extent, legal and equitable estoppels are found to correspond. In general, the grantor is estopped to aver that he had no interest, as in the case of an heir apparent upon whom the estate afterwards descends. So in case of a lease by indenture; or a bond conditioned to perform covenants in a deed, the existence of which deed the obligor cannot deny. The general principle therefore is well established, that a party is not allowed to plead or to prove any matter inconsistent with the terms of his deed.(5)(a)

(1) *Glen v. Gibson*, 9 Barb. 134.

(2) *Fauntleroy v. Henderson*, 12 B. Mon. 447.

(3) *Catterlin v. Hardy*, 10 Ala. 511.

(4) *Gilliam v. Bird*, 8 Ired. 280.

(5) *Heard v. Hall*, 16 Pick. 460-1. See *Fairtitle v. Gilbert*, 2 T. R. 171; *Hayne v. Maltby*, 3 441; *Hosier v. Searle*, 2 B. & P. 299; *Napier v. Elam*, 6 Yerg. 108; *Dezell v. Odell*, 3 Hill, 215; *Carr v. Wallace*, 7 Watts, 394; *Epley v. Witherone*, Ib. 163; *Jaques*

v. Weeks, Ib. 261; *Cronister v. Weise*, 8, 215; *Devinney v. Norris*, Ib. 314; *Shober v. Hauser*, 4 Dev. & B. 91; *Sample v. London, &c.*, 1 Nich. &c. 120; *Innocent v. North, &c.*, Ib. 256; *Gregg v. Wells*, 10 Ad. & El. 90; *Sandys v. Hodgson*, Ib. 472; *Nicholson v. Hooper*, 4 Y. & C. 179; *Blacklow v. Lows*, 2 Hare, 40; *West v. Reid*, Ib. 249; *Fuller v. Bennett*, Ib. 394; *Hatch v. Kimball*, 4 Shepl. 146. In Maine it is held, that there can be no verbal estoppel. *Hamlin v. Hamlin*, 1

(a) A and B were tenants in common, and A held a mortgage upon B's moiety of the land. They having conveyed jointly, with warranty, to C; held, A could not set up a claim

Appl. 141. A grantee by warranty deed may claim under it, though he has taken a second from the same grantor. *Thompson v. Thompson*, 1b. 235; *Bright v. Boyd*, 1 Story, R. 478. A, having a title to land, takes a mortgage from B, with warranty, and dies, leaving B his heir. The administrator brings a suit upon the mortgage. Held, B was not estopped to claim as heir. *Harding v. Springer*, 2 Shepl. 407; *Danley v. Rector*, 5 Eng. 211; *Chautauque, &c., v. White*, 6 Barb. 589; *Cox v. Buck*, 3 Strobb. 367; *Hall v. Fisher*, 9 Barb. 17; *Otis v. Sill*, 8, 102; *Knouff v. Thompson*, 16 Penn. 357; *Morris v. Moore*, 11 Humph. 433; *Isaacs v. Gearheart*, 12 B. Mon. 231; *Morton v. Hodgdon*, 32 Maine, 127; *Shapley v. Rangeley*, 1 W. & M. 213; *Inge v. Murphy*, 10 Ala. 885.

under the mortgage. *Durham v. Allen*, 2 Appl. 228. A grantor, after the conveyance, stood by and witnessed a purchase by the grantee from a widow and others, advised it, and said it would pass the third of the property, which the grantor afterwards claims as reserved from his deed, subject to dower. Held, the grantor was not estopped. *Swick v. Sears*, 1 Hill, 17; acc. *Palmer v. Cross*, 1 Sm. & M. 48.

So, if one in possession under a devise buys the land from a party pretending to have an adverse title; the former is not estopped to dispute such title. *Osterhout v. Shoemaker*, 3 Hill, 513. Nor does the rule apply, where the party having a claim to the land merely aided in making a valuation and division of it. *Wade v. Green*, 3 Humph. 547. There must be fraud or gross neglect. *Brewer v. Boston, &c.*, 5 Met. 478.

The following may be cited, as some of the most recent and somewhat conflicting cases upon this subject:

Where a person having title to property, of which he is apprised, stands by and suffers it to be sold by the sheriff, without asserting his title or making it known to bidders, he cannot afterwards set up his claim. And, in such case, even infancy would be no protection, provided the mind had arrived at those years of discretion when a fraudulent intent could reasonably be imputed to him. *Whittington v. Wright*, 9 Geo. 23.

Where a party, who has title to land by an unrecorded deed, makes himself instrumental in causing another to purchase the same from a third person, he will be estopped from setting up his title as against such purchaser. *Matthews v. Light*, 32 Maine, 305.

Although at law, as well as in equity, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time; yet several things are essential to be made out in order to the operation of the rule, viz., 1. That the act or declaration of the person must be wilful, that is, with knowledge of the facts upon which any right he may have must depend, or with an intention to deceive the other party; 2. He must at least, it would seem, be aware that he is giving countenance to the alteration of the conduct of the other, whereby he will be injured, if the representation is untrue; and, 3. The other must appear to have changed his position by reason of such inducement. *Copeland v. Copeland*, 28 Maine, 525.

The principle, that where one stands by and sees another laying out money, upon property to which he has himself some claim or title, and does not give notice of it, he cannot afterwards, in equity and good conscience, set up such claim or title, does not apply to an act of encroachment on land, the title to which is equally well known, or equally open to the notice of both parties; but only against one, who claims under some title not equally open and apparent to the parties, and in favor of one who would be misled or deceived by want of notice. *Casey v. Inloes*, 1 Gill, 430.

Where the owner of land permits another to build on and improve his land, without objecting or claiming title, but without any fraudulent intent, such acquiescence gives such other person no title to the land, and does not estop the heirs of the owner from recovering in ejectment. *Den v. Baldwin*, 1 New Jersey, 395.

Where a person has a recorded deed of land from the owner thereof, and also a recorded deed of the possessory right thereto from the occupant, and the latter afterwards conveys the land to a third person; the owner will not be estopped from asserting his title thereto, by reason of parol proof, that at the time of this latter deed, he stated to the grantee that the title was in the grantor. *Woodman v. Bodfish*, 25 Maine, 317.

Where A, without fraud and merely by mistake, shows to B, who has already taken a deed of a lot of land, certain points as the boundaries thereof, which were not its true boundaries, and afterwards acquires, by purchase from a third person, a good title to the adjoining lot, part of which is included within such boundaries; and subsequently a person claiming under B gives a deed of the land, included within the boundaries thus pointed out, with covenant of title; A is not estopped by his acts from setting up his adverse title to the part thus erroneously included, and consequently, in an action for breach of such covenant, the covenantee may set up as a breach the adverse title of B. *Parker v. Brown*, 15 N. H. 176.

A, being tenant in common, conveyed to B, by one deed, a part of the land in severalty, and by another deed a certain number of acres of the land in common and undivided, which

CHAPTER LXXXVIII.

VOID AND VOIDABLE DEEDS.

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| <ol style="list-style-type: none"> 1. Void deed, of what it is evidence. 2. Legislative authority over void deeds. 3. Duress. 7. Infancy. 10. Fraud, ignorance, surprise, want of consideration. 15. Weakness of understanding. 18. Fraud upon an intended husband or wife. | <ol style="list-style-type: none"> 22. Illegality; and whether a grantor may take advantage of it. 25. Immoral consideration. 28. Deeds made by one disseized—<i>maintenance</i>; whether the law against, is adopted here. 53. Rasure, interlineation, &c. 79. Deeds not conformable to statutory requirements. 80. Made on Sunday. |
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1. It is said, a deed duly executed, acknowledged and recorded, is admissible evidence of a grant, whether the grant be valid or void. So a grant, though void, is evidence of the nature and extent of the party's claim, who enters under it. Though defectively executed, a deed shows a color of title, and the extent of possession.(1)(a)

1 a. The mere ante-dating of a deed, for the purpose of overreaching an execution, does not render it fraudulent and void.(2)

1 b. Where a deed is voidable only upon delivery, it may be subsequently confirmed.(3)

2. The Legislature has authority to confirm deeds defectively executed. But if an act of the legislature, limiting an estate, is inconsistent with a deed of the same land, such act does not cure any informality of execution, but creates a new estate. And where a settlement is defectively executed, and, on an application of the settler, the legislature makes another, the first deed is not affected by subsequent general acts for curing defective deeds.(4)

(1) *Tyler v. Hammond*, 11 Pick. 193; *Milton v. First Congregl. &c.*, 10, 447; *Beach v. Sutton*, 5 Verm. 209; *Shackleford v. Smith*, 5 Dana, 237; *Adams v. Tiernan*, Ib. 394.

(2) *Patterson v. Bodenhamer*, 9 Ired. 96.

(3) *English v. Young*, 10 B. Mon. 141.

(4) *Dulany v. Tilghman*, 6 G. & J. 461.

deed was not recorded. B was present, afterwards, when the heirs of A, with C, were surveying the lot, spoke of the land he occupied in severalty as his, refused to sell it, &c., and made no mention of his farther claim under the other deed. But he was not present when any conveyance was made by the heirs. Held, he could not be estopped, by this transaction, from setting up his title under the second deed, if otherwise valid. *Great Falls Co. v. Wors-ter*, 15 N. H. 412.

(a) A void proceeding for laying out a private road, or a void grant, may form the basis of an adverse use and enjoyment of an easement. *Miller v. Garlook*, 8 Barb. 153.

So the levy of an execution upon land in possession of the debtor gives the creditor a seizin, though defeasible by the rightful owner. *Bartlett v. Perkins*, 1 Shepl. 87. But a deed cannot be color of title beyond what it purports to convey. *Woods v. Banks*, 14 N. H. 101. Nor is a mere quit-claim color of title, without showing color of title or possession in the party making it. Ib.

A deed from A to B, embracing land previously conveyed from A to B, will be inoperative so far as it respects the land already conveyed. *Evans v. Spurgin*, 6 Gratt. 107.

A deed is not fraudulent because it includes more land than was sold; it is only void for the excess. *Judge v. Houston*, 12 Ired. 108.

Where a deed purports to convey property of the grantor and of another, it is valid as to the former, though not the latter. *Richards v. Ewing*, 11 Humph. 327.

3. *Duress* by threats or imprisonment, avoids a deed. But the imprisonment must be an illegal one. If lawful, a deed made either to procure a discharge, or on any other fair consideration, is valid.(1)

4. *Duress* may consist in a reasonable and well-founded fear of death, mayhem, or loss of limb: but not in fear of injury to property, or of a battery, because redress may be had for these in damages.(2)

5. It seems, menaces of imprisonment to a woman, if fully proved, will avoid any instrument.(3)

6. *Duress* renders a deed *voidable*, not *void*. The grantor must re-enter within twenty years.(a) In this respect, an executed conveyance stands on a different footing from executory contracts. As a ground for avoiding the latter, *duress* must be *pleaded*. But, inasmuch as the grantee has possession of the land, the grantor might never have opportunity to plead such matter in defence; and, but for the right of entry, would be without remedy. Until entry, the grantor cannot make a new conveyance, being disseized. Only he or his heirs can avoid the deed. But entry may be made even upon a *bona fide* purchaser from the first grantee.(4)

7. It has been held, in New Hampshire, that the bargain and sale of an infant is void, although his feoffment, with livery, is only voidable.(b) But, in New York, it is decided, that the former as well as the latter is only *voidable*; whether a conveyance at common law, or under the statute of uses, or a statutory grant. It may be avoided by the infant when he attains his age, and by those who are privy in blood or estate; but not by a stranger. This is the case with all *specialties*, except those which confer a mere naked authority, and which are merely *void*. So, in Delaware, one in possession under the deed of an infant is not a trespasser.(5) So, in Tennessee, a deed of land made by a *feme covert* who is also an infant, in the manner required by statute, is not void, but will vest the title in the vendee, subject to be avoided at the election of the infant, after the removal of her disability.(6) But in Kentucky, the deed of an infant *feme covert* is void; and, where its invalidity is set up by the *feme* during her life, in her answer to a bill to foreclose a mortgage made by her, and by her children after her, there is no waiver of the defence.(7)

8. As to the manner in which an infant may avoid his deed, the ancient law seems to have provided for this purpose a special writ of "*dum fuit infra etatem*;" of which he or his heir might avail himself. But the infant could not sue till he came of age. He might enter, however, and entry by an heir remitted him to his ancestor's title.

(1) 2 Inst. 482; *Alexander v. Peirce*, 10 N. H. 494. See *Swift v. Fitzhugh*, 9 Por. 39; *Moore v. Adams*, 8 Ohio, 372.

(2) *Ibid*.

(3) *Worcester v. Eaton*, 11 Mass. 379.

(4) *Worcester v. Eaton*, 13 Mass. 371, 11, 379. See 2 Black. Com. 290, 3, 173-5.

(5) *Roberts v. Wiggin*, 1 N. H. 73; *Bool v. Mix*, 17 Wend. 119; *Wallace v. Lewis*, 4

Harring, 75; *Dominick v. Michael*, 4 Sandf. 374. See *Lowe v. Griffith*, 1 Scott, 458; *Richardson v. Boright*, 9 Verm. 368; *Scanlan v. Wright*, 13 Pick. 523; *Gillet v. Stanley*, 1 Hill, 121; *Salmon v. Clagett*, 3 Bland, 141; *Myers v. Sanders*, 7 Dana, 521; *Nelson v. Lee*, 10 B. Mon. 49.

(6) *Scott v. Buchanan*, 11 Humph. 468.

(7) *Mackey v. Proctor*, 12 B. Mon. 433.

(a) But see *Somes v. Skinner*, 16 Mass. 348.

(b) But if an infant grantee remain in possession and improve the land after coming of age, and offer to sell it; this is a ratification. *Robbins v. Eaton*, 10 N. H. 562. The guardian of an infant may avoid his deed. *Freeman v. Bradford*, 5 Por. 270.

When the conveyance was by feoffment, entry was always necessary to revest the estate, being a proceeding of equal notoriety. But if by any other mode, a new deed, after coming of age, would at once defeat the old estate, and create a new one. And it is the general rule, that the disaffirmance of a voidable act need only be with the same solemnity as the original transaction. A court of equity will not interfere to avoid the deed of an infant.(1)

9. In Massachusetts, it has been said that the mode of avoiding a deed for *infancy* is the same, as that above stated of avoiding it for *duress*. (See sec. 6.) The party may re-enter, either before or after coming of age. In New York, it is held that an infant cannot avoid his deed before coming of age, though he may enter and take the profits of the land. He cannot reclaim the land by a suit, unless he enter and make a new conveyance, or do some other act of equal notoriety; as, by demanding possession, or declaring his intention not to be bound by the deed. If the conveyance were by feoffment and livery, he may re-enter, or bring the writ "*dum fuit*," &c. If by bargain and sale, he cannot make another valid conveyance without entry, unless the land is vacant land, in which case he may. If the land is held by a possession adverse to him, it seems, another deed would be no-revocation of the former. It is doubted, whether mere silence and acquiescence amount to a confirmation.(2)(a)

(1) Stearns on R. A. 186; 14 John. 124; Kent, 233 & seq. Zouch v. Parsons, 3 Burr. 1794; 2 Prest. on Convey. 249; 1 Pres. Abs. 379; Bool v. Mix, 17 Wend. 119. See 2

(a) In North Carolina, it is held, that the possession of one purchasing from an infant is *adverse*, and that the grantor cannot validly convey anew, after coming of age. Murray v. Shanklin, 4 Dev. & B. 289. If, after coming of age, he writes upon the back of the deed, "I have signed the within for the expressed purposes, and, with the desire to ratify it, affix my hand and seal," and delivers the deed anew; it thereby becomes effectual. Ib.

In New York, the deed of an infant is not, as a matter of course, superseded and annulled by the mere execution, after he attains his age, of another conveyance, even to a purchaser for value. Dominick v. Michael, 4 Sandf. 374.

To compel a purchaser to accept such second conveyance, as a valid title, it is not sufficient to allege that no act has been done, or caused to be done, by the infant, after coming of age, in confirmation of the first deed. But it must be averred, and proved, that the grantor has, since coming of age, by some positive act, disaffirmed such deed. Ib.

To enable the infant grantor to pass a title when of age, by a second conveyance, his previous actual entry upon the land is an indispensable requisite in all cases, except where the infant has retained possession, or, at the time of executing the second deed, the land is wholly vacant. Ib.

So, in Georgia, if an infant execute a deed of bargain and sale of land, the execution of another deed of the same land, by the infant, after arriving at full age, to a third person, while the land is held adversely to the infant under the first deed, and without an entry by the infant for the purpose of avoiding the first deed, will not enable the second grantee to take advantage of the infancy to set aside the first deed. Harris v. Cannon, 6 Geo. 382.

The latter deed will be void, in accordance with the statute of 32 Henry VIII. Harrison v. Adcock, 8 Geo. 68. A deed was made of land, by a husband and wife, she being an infant, in 1816, and a subsequent deed of the same land by her in 1846. Held, the latter deed avoided the former one, and passed a good title. Youse v. Norcross, 12 Mis. 549.

The voidable deed of an infant may be affirmed by an express ratification, or by acts which reasonably imply an affirmation, or by the omission to disaffirm the deed in a reasonable time; and what is a reasonable time is a question of fact for the jury, and must depend on the circumstances of each particular case. Scott v. Buchanan, 11 Humph. 468.

The deed of an infant to land is not void, but voidable only at his election. Ib.

Four years after coming of age has been held an unreasonable time. Wallace v. Lewis, 11 Harring. 75.

If an infant purchase land, and execute notes for the purchase-money, or a mortgage of

10. *Fraud* avoids a deed, like other contracts, both in law and equity, as against the party defrauded. But, as the forms of proceeding in equity are better adapted to the discovery of fraud, this tribunal is generally resorted to for the purpose. But even in equity the evidence of fraud must be clear and conclusive. It is said, that the only fraud which can be pleaded *at law* to avoid a deed, is not *in the consideration*, but *in the execution*; such as a fraudulent reading, the substitution of one instrument for another, or the obtaining, by some device, such an instrument as was not meant to be given. *Delivery* by fraud avoids, as well as *execution* by fraud.(1)(a)

11. Equity sometimes avoids a deed as obtained by ignorance, misapprehension or surprise, but only in clear cases. The surprise must not be a mere act of imprudence, but attended by fraud and circumvention. There must be either *suppressio veri* or *suggestio falsi*.(2)(b)

12. Inadequacy of consideration is sometimes a ground for the interference of equity; but only where the party did not understand the bargain, or was forced into it by some oppression. But, it is said, there is no case where mere inadequacy of price is a ground for annulling even an executory contract, which is capable of specific performance; much more for avoiding an executed agreement.(3) It is said, inade-

(1) 4 Cruise, 340; Abingdon v. Butler, 1 Ves. 208; Belden v. Davies, 2 Hall, 433; Moss v. Davidson, 1 Sm. & M. 112; Buck v. Sherman, 2 Doug. 176. See Richardson v. Boright, 9 Verm. 368; Osterhout v. Shoemaker, 3 Hill, 513; Breckinridge v. Floyd, 7 Dana, 459. Jackson v. Summerville, 1 Harr. (Pen.) 359. See Haggins v. Peck, 10 B. Mon. 210; Stayton v. Morris, 4 Harr. 357; Rogers v. Colt, 1 N. J. 704; McGraw v. Gwin, 7 Ired. Equ. 55; Gaut v. Hunsucker, 12 Ired. 254.

(2) Ib. See Bell v. Morse, 6 N. H. 205; Boughton v. Sandilands, 3 Taun. 342.

(3) Ib.; Whitehorn v. Hines, 1 Munf. 557; Cruise v. Christopher, 5 Dana, 182; Mordecai v. Tankersly, 1 Alab. (N. S.) 100; Robinson v. Schly, 6 Geo. 515. See Raymond v. Kelton, 1 Ten. 415; Amis v. Satterfield, 5 Ired. Equ. 173.

the land to secure it, he cannot disaffirm the notes and mortgage, and claim the land under his deed. Weed v. Beebe, 21 Vt. 495.

Where an infant purchased land, and paid a part of the purchase-money, but executed no mortgage for the security of the residue, and afterwards, upon an attempt being made by the vendor to collect the residue by a suit, pleaded his infancy in bar, and thus defeated the suit, but still retained the land, and, after he became of age, conveyed the land to a third person; held, the vendor had a lien upon the land for the payment of that portion of the purchase-money remaining unpaid, and might enforce that lien in Chancery, without repaying, or offering to repay, the amount which he had received towards the purchase-money. Ib.

A writ of entry, brought by husband and wife to recover land, sold by her when an infant and unmarried, is a disaffirmance of the sale. Chadbourne v. Rackliff, 30 Maine, 354.

(a) A deed founded in part upon a fraudulent consideration is wholly void. Hafner v. Irwin, 1 Ired. 490.

(b) A bargain will be annulled in equity, if founded upon material representations of matters of fact, which are untrue, though inadvertently made, through mutual mistake, or that of the grantors alone. Daniell v. Mitchell, U. S. C. C. May, —40; Maine Law, Rep. Mar. —41, p. 412.

Contract, to sell and purchase a tract of timber land in Maine, and that if, upon exploration, it did not contain sixty millions of timber, and a stream adequate to convey logs to the Kennebec river, the agreement should be void. An exploration was made, and, upon a favorable representation by the agent, the purchaser took a deed, and made the stipulated payments. It afterwards turned out, that the wrong tract was explored, and that the one conveyed contained only five millions of timber. Held, on a bill in equity by the purchaser, the contract and conveyance should be rescinded, and the purchase-money restored. Ib. If an ignorant person is induced to execute a deed under the impression that it will operate in one way, when in fact it operates in another, the deed is void. Doe v. Bennett, 8 Carr. & P. 124.

Though fraud, circumvention, or undue influence will avoid a deed, fair argument and per-

quacy of price cannot be set up at law, because a court of law has no power to place the parties to a conveyance *in statu quo*.⁽¹⁾

13. It has been held, in Massachusetts, that where a deed is obtained by fraud and imposition, and the grantee enters, records his deed, and conveys to an ignorant purchaser, the latter shall hold the land.⁽²⁾

14. There are various kinds of *constructive* fraud, which furnish sufficient grounds for setting aside a deed.^(a) As in case of bonds or leases, given as rewards for procuring marriages or offices. Purchases, by trustees, or *quasi* trustees, of the trust property, fall under the same general principle.^(b) (See *Trust*.)

15. Weakness of understanding is another ground for avoiding a deed.^(c) Upon this subject the general principle is, that incompetency or derangement, if alleged, must be proved, and, when once proved to have existed at a certain time, the burden is upon the other party, to show that it did not exist at the time in question, or to prove *a lucid interval*.^(d) Upon this subject there are numerous decisions and nice distinctions, which it is foreign from the plan of the present work to notice.

(1) *Robinson v. Schly*, 6 Geo. 515.

(2) *Somes v. Brewer*, 2 Pick. 184.

(a) A deed, voidable for fraud, will be rendered valid by the grantor's acknowledging and leaving it with the grantee. *Osterhout v. Shoemaker*, 3 Hill, 513.

(b) A deed of settlement, whereby the settlor is delivered, bound hand and foot, as to the property settled, into the power of his trustee, cannot be maintained in equity, without the clearest proof that it was made at and with the request, consent, knowledge, or instance of the settlor; and a solicitor, who takes upon himself to prepare such a deed for execution by his client, without the clearest evidence of the concurrence of the latter, does so, subject to all the consequences and liabilities of the deed being set aside, notwithstanding the solicitor may have been influenced by motives for the benefit of his client, in preparing the settlement. Therefore, where the plaintiff, alleged by the defendant to be young and extravagant, applied to a solicitor to raise a certain sum on mortgage, and the latter, with a view to prevent the former from dissipating his fortune, tied up the whole of his property and constituted himself sole trustee; the court, on bill filed by the plaintiff, alleging that the deed of settlement had been prepared without his authority, consent, or knowledge, and there not being any evidence to the contrary, declared the deed void in equity, and directed a reconveyance of the trust property by the trustee. *Moore v. Prance*, 7 Eng. Law & Eq. 17.

(c) Mere imbecility or folly, not amounting to lunacy or idiocy, without actual or constructive fraud, will not avoid a deed. *Odell v. Buck*, 21 Wend. 142; *Siemon v. Milson*, 3 Edw. 36. So with old age. *Suttles v. Hay*, 6 Ired. Equ. 124. See *Stewart v. Lisenard*, 25 Wend. 255. Where the grantor is a drunken man, and there is an agreement to reconvey, but on hard terms, a reconveyance will be decreed upon payment of what is justly due. *Morrison v. McLeod*, 2 Dev. & B. 221. See *Cruise v. Christopher*, 5 Dana, 182; *Harbison v. Lemon*, 3 Blackf. 52. If a grantor is so much intoxicated as not to understand what he is doing, the deed is void, at least as to third persons. *Dulany v. Green*, 4 Haring. 285. Where an aged and infirm man conveyed to his friend and physician, a money consideration being stated in the deed, but not actually existing, the conveyance will be held fraudulent. *Gibson v. Russell*, 2 Y. & Coll. Cha. 104. The heirs of a grantor cannot avoid his deed, on the ground that he was old and infirm, the deed was not read to him, and was without consideration; he having remained in possession till his death. *Kimball v. Eaton*, 8 N. H. 391. But a deed is void, if the grantor had not strength of mind and reason, equal to a clear and full understanding of the nature and consequences of his act. *Dicken v. Johnson*, 7 Geo. 484.

(d) Otherwise, with insanity caused by a violent disease, or other accidental or temporary cause. The question, whether a delusion is temporary or habitual, is for the jury. *Hix v. Whittemore*, 4 Met. 545; *Townshend v. Townshend*, 7 Gill, 10. In case of a lunatic, his deed can be made good only by re-execution. But, where a grantor merely labors under feebleness of intellect produced by disease, a long acquiescence, after his mind is restored, will give a good title. *Jones v. Evans*, 7 Dana, 96.

16. The deed of a *non compos* is voidable by himself, his heirs or devisees. If he is under guardianship, it is absolutely void.(a) So, in New York, a deed to or from a lunatic, made before office found, is merely voidable by a privy. In Connecticut, the deed of one who is under a *conservator*, though made with the consent of the latter, is void, even as a license. A deed may be avoided by proof of a feeble understanding in the grantor, and undue influence over him by the grantee. And, to establish these points, all transactions between the parties, whether previous or subsequent, are admissible in evidence.(1)

17. A, the demandant, claims land as heir of B. C, the tenant, offers deeds from B to himself, which A impeaches, by proving the old age and habitual intemperance of B, and an inadequate consideration. It did not appear that C took possession under the deeds. Before making the deeds, B devised the land to D, a minor, providing that C should have possession of the land, as guardian, during D's minority. Held, A was not disseized of the land, (at the making of the will)(b) or at his death, as the deeds passed no interest in the land; that the will was not revoked by the deeds; that C was entitled to possession under the will; and therefore that the action must fail.(2)

18. Equity will set aside a deed made by a woman just before marriage, as being a fraud upon the intended husband. In one case, a recognizance made under these circumstances was set aside, though a witness testified that the husband consented to it; such witness having himself an assignment of the security. So a conveyance to trustees for her use will be set aside.(3) Thus where a woman, just before marriage, secretly, and with the intent to deceive her intended husband, conveyed her property to her children by a former husband, held, the conveyance was void as to the second husband, though the children were innocent.(4) But, a deed made by a woman a few days before her marriage, of which the husband had knowledge before the marriage, to secure a debt due to her daughter by a former marriage, is valid.(5)

19. This principle has been applied to the deed of a widow, made upon the eve of a second marriage. But where a widow, before any treaty for a second marriage, conveyed publicly most of her property to trustees, in trust for herself during widowhood, and, upon her second marriage, for her second son; held, this was a reasonable provision for her son, and should be sustained. So where a woman, in contemplation of marriage with a certain man, and with his consent, conveyed to

(1) *Griswold v. Butler*, 3 Conn. 228; *Wait v. Maxwell*, 5 Pick. 217; *Jackson v. Gumaer*, 2 Cow. 552; *Somes v. Skinner*, 16 Mass. 348; *Dicken v. Johnson*, 7 Geo. 484.

(2) *Smithwick v. Jordan*, 15 Mass. 113. See *Gould v. Womack*, 2 Alab. (N. S.) 83.

(3) *Lance v. Norman*, 2 Rep. Cha. 41; *Howard v. Hooker*, Ib.; *Taylor v. Pugh*, 1

Hare, 608; *Tucker v. Andrews*, 1 Shepl. 124; *Jordan v. Black*, 1 Meigs, 142; *England v. Downs*, 2 Beav. 522. See *McAfee v. Ferguson*, 9 B. Mon. 475; *Goodson v. Whitfield*, 5 Ired. Equ. 163; *Strong v. Menzies*, 6 Ib. 544.

(4) *Tisdale v. Bailey*, 6 Ired. Eq. 353. (5) *Fletcher v. Ashley*, 6 Gratt. 332.

(a) The possession of one, occupying by virtue of an agreement with a *non compos*, is not adverse. *Lewis v. Thomas*, 3 Hare, 26. And his deed is only voidable, though it be not recorded. *Allis v. Billings*, 6 Met. 415. A deed of partition of a *non compos*, by his guardian is good, till avoided. *Thomas v. Hatch*, 3 Sumn. 170.

(b) As the deeds were subsequent to the will, this was self evident.

trustees for her separate use, reserving a power of revocation, and afterwards married another person, who by duress induced her to revoke the conveyance, and the parties subsequently separated; the Court of Chancery sustained a bill brought by the wife, to establish her conveyance, and set aside the revocation.(1)

20. The same principle has been applied to ante-nuptial conveyances made by men, to defeat their intended wives of dower; as by charging the estate or vesting it in trustees. More especially is this the case, where the conveyance is in fraud of a settlement upon the wife.(2)(a)

21. A conveyance may sometimes be set aside as fraudulent against the heirs of the grantor. Thus, where A. received a power of attorney from B to convey all his real estate, B having previously made his will, bequeathing all his property to A; and, for the purpose of turning into personal property certain land acquired by B after the making of the will, in order that A might take it under the devise, A conveyed such land to C, who had notice of this purpose, taking C's notes for the price, payable to B, and also giving B a lease, for his life, subject to a rent equal to the interest on the notes; and the land remained in B's possession till his death, he having no knowledge of the above-mentioned transactions; and after his death A gave up the notes to C, who had not recorded his deed, C then conveyed to A, who afterward caused his own deed to C to be recorded;—held, a fraud upon B's heirs, and that they should recover the land from A by writ of entry.(3)

22. It is said, that, by the common law, a deed, contrary to the provisions of a general statute, or made for unlawful consideration, or to carry into effect a contract unlawful in itself or made so by a prohibitory statute, is void *ab initio*.(4)(b)

23. But, in general, a deed made for illegal or immoral consideration is not void.(c) Thus, where one makes a conveyance of land, in consideration of an expected release from a criminal prosecution by the intervention of the grantee, the former cannot avoid his deed. This is in analogy with the well settled rule concerning personal contracts. An executory contract may be avoided for the cause above referred to; but

(1) *Carleton v. Dorset*, 2 Vern. 17; 2 Ves. 264; *Cotton v. King*, 2 P. Wms. 358; *Strathmore v. Bowes*, 2 Bro. 345; 1 Ves. Jun. 22; 6 Bro. Parl. 427; 2 Cox, 28.

(2) *Mertins v. Bennett*, Bunb. 336; *Show*.

Parl. 71; *Palmer v. Neave*, 11 Ves. 165. (See *Stewart v. Stewart*, 5 Conn. 317;) *London v. London*, 1 Humph. 1.

(3) *Fay v. Winchester*, 4 Met. 513.

(4) *Phelps v. Decker*, 10 Mass. 267.

(a) But a widow is not a creditor or *subsequent purchaser*, within the meaning of a statute, which provides that an unrecorded deed shall be invalid against such parties. *Norwood v. Marrow*, 4 Dev. & B. 442. Nor will a conveyance to children be in fraud of dower, merely because it is voluntary, unless there is an actual fraudulent intent. *McIntosh v. Ladd*, 1 Humph. 459.

One of the badges of fraud upon the rights of his wife, to prevent her receiving any portion of his estate at his death, is the retention by the husband of the possession of the property after the transfer of the title, or keeping the deed in his hands after its execution. *Hays v. Henry*, 1 Maryland Ch. Decis. 337.

Where the husband, with a design to deprive his widow of her share of his personal estate, bought lands with it, and then executed conveyances thereof, but did not part with the possession, but lived upon and enjoyed the property until his death; the deeds were set aside, as frauds upon the rights of the wife. *Ib.*

(b) In Ohio, a deed made for a gambling consideration has been held void. 1 Ohio, 403.

(c) No one can allege his own illegal act to avoid his own deed. *Watts v. Brooks*, 3

money paid in pursuance of it cannot be recovered back, except where oppression or extortion is practised by one party upon the other, as in case of usury. In such case, the parties are not *in pari delicto*. But, where a contract is merely unlawful, as immoral or against public policy, money paid cannot be recovered. Upon similar ground, a grantor cannot reclaim his land, though the deed was unlawfully procured; because, in order to do so, he must appear as plaintiff, not as defendant.(1)(a)

24. It has been held, that a deed, made for the purpose of giving the grantee a colorable qualification to kill game, is valid against the grantor.(2)

25. There is another class of cases tending to show, that a deed, like other contracts, founded upon an immoral consideration, is void both in law and equity. A familiar illustration of this principle, is the case of a deed made to a female as the *price of prostitution*. Most of the decisions upon the subject, however, relate not to *conveyances*, but to *executory contracts*; and it may perhaps be doubted whether they are applicable in their full extent to the former class of instruments. In regard to bonds or obligations given under these circumstances, the distinction seems to be well established, that if made with a view to future cohabitation they are void; while, if made solely for the support of the woman, they are good at law, and equity will not relieve against them. Nor is it material, in the latter case, whether there were *seduction* or not. So, although the obligee of the bond was a common prostitute, it will not be set aside in equity. But equity will not sustain a bond given by a married man to a woman whom he has seduced, and who knew him to be married.(3)

26. It has been held in Virginia, that where a man marries a woman by whom he has previously had children, he may make a valid settlement, as against creditors, upon the children as well as the wife; the law regarding them as purchasers.(4)

27. In South Carolina, it has been held that a deed made in consideration of future illicit cohabitation is void; but not one made during such cohabitation. The statute of that State, prohibiting a person having a wife or children from settling upon or conveying to a woman, with whom he lives in adultery, more than one-fourth of his estate, does not render valid contracts otherwise void, but recognizes the right to make compensation for a wrong inflicted.(5)

28. It is the general rule of law, that a deed is void if made by one, who, though having a legal right to land, is at the time of conveyance disseized.(6) The law will not permit any person to *sell a quarrel*, or, as it is commonly termed, a *pretended title*. Such conveyance is an offence

(1) *Worcester v. Eaton*, 11 Mass. 368.

(2) *Doe v. Roberts*, 2 B. & A. 367.

(3) *Walker v. Perkins*, 3 Burr. 1568; 1 Bl. R. 517; *Gray v. Mathias*, 5 Ves. 286; *Andamale v. Harris*, 2 P. Wms. 432; *Cray v.*

Rooke, For. 153; 1 Bro. Parl. 250; *Turner v. Vaughan*, 2 Wils. 339; *Hill v. Spencer*, Amb. 641; *Priest v. Parrot*, 2 Ves. 160.

(4) *Coutts v. Greenhow*, 2 Muf. 363.

(5) 2 S. C. Cons. R. 279.

(a) But in case of a lease, made for an object which by statute is illegal; no action lies upon the covenants. *Gas, &c. v. Turner*, 6 Bing. N. 324.

(b) On the other hand, a disseisor may by his alienation pass a title, subject to the paramount right of the disseizee. *Flagg v. Mann*, 2 Sumner, 490.

at common law and by a statute of Henry VIII; and it has been said, there is none more deserving of animadversion.(1)

29. The possession of other parties than the grantor of course is not necessarily adverse, but must be proved to be of this character. It need not be under a valid title.(2)

30. In the case above referred to, the grantor retains his title, and may bring a suit against the party in possession. Nor is it any defence to such action, that the action is brought at the expense and for the use of the grantee. Neither the common law nor the Statute of Henry VIII provides, as a penalty for maintenance, a forfeiture of the land; nor was such penalty ever imposed in England, Massachusetts, or New York. In Maine, as early as 1797, a case occurred, in which an action was defeated upon this ground.(a) But Mr. Dane, who mentions, also questions this case, and in 1810 it was overruled as *hastily decided*. A conveyance of this nature has been compared, in argument, to the case of one who sells goods, knowing that they are to be used unlawfully, and who can maintain no action for the price. But the distinction was taken by the court, that, in the sale of a dormant title to land, there is no contract between the seller and the party in possession. The latter can gain no right by the offence of the former; he cannot purge his wrong to the demandant, by showing that the demandant has wronged the public. The deed is void *as such*, and can operate only by estoppel. The grantee could maintain no action for the land, and the grantor, after recovering it, may convey to a third person, who will hold against the first grantee.(b) Nor does it appear, from the record, that the action is brought to enforce an unlawful contract. And the deed is valid, except as against the adverse occupant or those claiming under him. Thus, if the occupant quits possession, the grantee may enter. So he may maintain ejectment against a third person.(3)

31. So, where the defendant in a real action sets up a release made pending the suit, it is no answer to this defence, that he knew of a conveyance made by the demandant, and that the suit is brought for the grantee's benefit. The law will not avoid such release, to give effect to an illegal act.(4)

32. A, being disseized, conveys to B, giving him authority to sue for the land. B brings an action, and A executes a release to the tenant. B then brings an action on the case against A, to recover the costs and charges of the former suit. Both A and B knew of C's adverse possession. Held, the action was founded on a breach of law, and could not be sustained. The remedy, if any, would be upon the covenant of

(1) Lit. 347, 5 Mass. 236-7; *Swett v. Poor*, 7, 77; 11 Mass. 554; *Partridge v. Strange*, 1 Plow. 88.

(2) *Com. v. Dudley*, 10 Mass. 403; *Thurman v. Cameron*, 24 Wend. 87.

(3) *Brinley v. Whiting*, 5 Pick. 348; *Jack-*

son v. Brinckerhoff, 5 John. 500; 3 John. Cas. 101; *Williams v. Jackson*, 5 John. 500; 6 Dane, 743; 5 Pick. 358-9-60; *Livingston v. Prosens*, 2 Hill, 526.

(4) *Everenden v. Beaumont*, 7 Mass. 76.

(a) *Aliter*, by statute. Rev. St. 371.

(b) It has been said, that such recovery will enure to the grantee's benefit. *Livingston v. Prosens*, 2 Hill, 526. Probably, however, the law is correctly stated in the text. That the rule is somewhat qualified, where a title obtained during a disseizin is set up in defence, by way of *rebutter*, see *Wade v. Lindsey*, 6 Met. 407.

seizin.(a) So a bond, given for the purchase-money of land in the adverse possession of another, is void.(1)(b)

33. It has been intimated, that the purchase of a dormant title is an offence, only when made *wittingly*, to disturb the possession. It is said, by the policy of the law and in virtue of ancient statutes, where a grantor is disseized *and the grantee knows it, perhaps*, the conveyance is void. But not where the parties are ignorant of the fact, as where they live at a distance from the land. In Massachusetts, there have been numerous grants by proprietors who were disseized; recoveries had in the name of the grantors; and then the grantees have entered. Hence, it is said, only those in possession at the time of the conveyance can avail themselves of the grantor's want of seizin.(2)

34. In New York, also, a distinction has been suggested, between the sale of a pretended title as a matter of speculation, and that of a valid right; and in the same State it is held, that the doctrine of maintenance does not apply, where both the grantor and the occupant were under an equitable obligation to convey the land.(3)

35. In other cases in Massachusetts it is said, that the ignorance of the parties makes no difference as to the legal effect of the transaction in question. And in still another, (which probably is the most accurate statement,) that knowledge may be necessary *to make the transaction criminal*.(4)(c)

36. To constitute adverse possession, there must be *pedis possessio*, or a substantial enclosure; but an artificial fence or other erection is not necessary. A river, mountain or continued ledge of rocks, by which the intrusion of cattle is prevented, is sufficient. There is no adverse possession, unless the party entered *bona fide*.(5)

37. A deed given by one who has no written title, but claims in virtue of a settlement, is no proof of title, if the fact of his never residing upon the land clearly appears.(6)

38. The statute against the sale of pretended titles does not embrace merely *equitable* rights. And a sale by a *cestui que* trust does not constitute maintenance, though the trustee contests the title.(7)(d)

39. Where an owner formally and peaceably enters upon the land, a conveyance by him is valid, notwithstanding an adverse possession, and though the grantee knows the title is in dispute.(8)

(1) *Swett v. Poor*, 11 Mass. 549; *Breckinridge v. Moore*, 3 B. Monr. 635.

(2) *Somes v. Skinner*, 3 Pick. 61-2.

(3) 3 John. Cas. 105; *Cameron v. Irwin*, 4 Hill, 272.

(4) *Wolcot v. Knight*, 6 Mass. 420; *Everenden v. Beaumont*, 7, 78.

(5) *Jackson v. Halstead*, 5 Cow. 216; *Livingston v. Peru, &c.*, 9 Wend. 511.

(6) *Hoak v. Long*, 10 S. & R. 9.

(7) *Wood v. Griffith*, 1 Swanst. 55; *Allen v. Smith*, 1 Leigh, 231; *Baker v. Whiting*, 3 Sumn. 476.

(8) *Birthright v. Hall*, 3 Munf. 536; *Warner v. Bull*, 13 Met. 1.

(a) It has been doubted, whether such an action could be maintained. *Williams v. Hogan*, Meigs. 187.

(b) But, if a deed is obtained by fraud, equity will not allow the grantee to aver, that the grantor was disseized, and therefore incapable of conveying a title. *Harding v. Randall*, 3 Shepl. 332. And a court of equity will not afford relief to the occupant of real estate, on the ground of an attempted conveyance by one disseized. *Keneda v. Gardner*, 4 Hill, 469.

(c) In Tennessee, the fairness and good faith of the transaction have no bearing on its legal validity. *Gass v. Maloney*, 1 Humph. 452.

(d) A devisee for life, if disseized, cannot convey. *Webster v. Gilman*, 1 Story R. 499.

40. A deed from the State is good, notwithstanding adverse possession of the land.(1)

41. Where an occupant claims as heir or tenant of a mortgagor, this is not an adverse possession, which will avoid a deed from the mortgagee or his assignee upon foreclosure.(2)

42. Deed of three pieces of land, and an adverse possession of one of them. The deed is valid as to the others.(3)

43. The rule of law against the sale of pretended titles may be considered as for the most part adopted into American jurisprudence, and is generally affirmed by express statute; but in some of the States it has been modified or abolished. The common law rule has been recognized in Massachusetts and Indiana. In Massachusetts, there is no statute on the subject; but the act has always been unlawful. It is doubtful, whether the statutory penalty is incurred; but it may be punished by fine and imprisonment. In Maine, where one has the right of entry, though disseized, his conveyance is good.(4)(a)

44. In Connecticut, the seller and buyer forfeit, each one-half the value of the land.(5)(b)

45. But in Pennsylvania, though not expressly abrogated, the rule is held not to be in force.(6)(c)

(1) *Jackson v. Gumaer*, 2 Cow. 552.

(2) *Jackson v. Jackson*, 5 Cow. 173.

(3) *Goodman v. Newell*, 13 Conn. 75.

(4) *Fite v. Doe*, 1 Ind. 127; *Galbreath v. Doe*, 8 Blackf. 366; *Michael v. Nutting*, 1 Smith, 291; *Wellman v. Hickson*, 1 Smith,

407; *Brinley v. Whiting*, 5 Pick. 356; *Me. Rev. St.* 371.

(5) *Con. St.*; *Hinman v. Hinman*, 4 Conn.

575; *Hyde v. Morgan*, 14 Conn. 184.

(6) *Cresson v. Miller*, 2 Watts, 272.

(a) It is said by Judge Story, that the old law on this subject is not fully adopted. *Baker v. Whitney*, 3 Sumn. 476.

(b) In Connecticut, a quit-claim deed is a primary conveyance, and vests in the releasee all the interest, even in fee, which the releasor possesses. *Sherwood v. Barlow*, 19 Conn. 471.

A school district had been, for more than 30 years, in the adverse, exclusive possession of a piece of land, on which they had erected a school-house, and used it for the purposes of a school. A, the adjoining proprietor, claiming a title to the premises from his ancestor, executed his quit-claim deed thereof to B, who received it, with full knowledge that the district was thus in adverse possession. Held, 1. That a quit-claim deed is an *alienation*, within the meaning of the statute against selling pretended titles; 2. That, from a possibility of a dissolution of the district, A did not possess a reversionary interest which he could convey by deed, as it did not appear that the district held under a title derived from A, or his ancestor; 3. That the district, as disseizers, had acquired a perfect title in fee; 4. That B was liable to the penalty of the statute for receiving the deed. *Ib.*

To constitute an euster, by the entry and possession of another person, within the statute against selling pretended titles, an actual exclusive possession as owner is sufficient. *Sherwood v. Waller*, 20 Conn. 262.

In 1817, a school-district took possession of certain land and built a school-house thereon, which they occupied for a school till 1845, when it was burned. The district thereupon contracted with A for a purchase of the land, received a deed of it from him, and built a new school-house on the site of the old one, which they ever afterwards exclusively occupied, claiming the right to do so under their deed. In 1847, the district being thus in possession, A conveyed to B. Held, A, at the time of the latter conveyance, was ousted, within the statute. *Ib.*

So, although the agent of the district kept A's deed of 1845, and, contrary to A's expectations, neglected to pay the purchase-money. Held, the deed to B was not merely a conveyance of A's lien for the price, but an alienation of the land. *Ib.*

(c) So in Vermont. *Hibbard v. Hurlbut*, 10 Verm. 170. In the same State, a mortgage cannot be legally assigned, where there is an adverse possession. *Converse v. Searls*, 10 Verm. 578. In the same State, the *covenants* are binding; and a deed to the *occupant* is valid. *Rev. St.* 315.

A contract for the sale of real estate, of which a third person is in adverse possession, is not corrupt, as against the policy of law, nor is it prohibited by the statute. The effect of

46. So, in New Hampshire, it is no *offence* to purchase lands held adversely, and it is the general impression that such purchase is not invalid in law.(1)

47. In New York, a person disseized cannot convey except by way of mortgage. Conveying land is a misdemeanor, unless the grantor has had possession for one year preceding. But, as between the parties, a deed passes the title.(2)(a)

48. In South Carolina and North Carolina, a purchase of, or contract for, the title to real estate is forbid, unless the seller or those under whom he claims have been in possession, or had the reversion, or the rents and profits, a whole year previously. The seller forfeits the land, and the buyer its value. But one in possession may purchase a pretended title.(3)

49. In Kentucky, by an act of 1824, a conveyance of, or contract for, land held adversely, is void, and the vendor retains his title.(4)(b)

50. In Kentucky and Tennessee, there must be *an adverse possession*, and, if the seller be a non-resident, such possession must be by deed,

(1) Hadduck v. Wilmarth, 5 N. H. 181.

(2) 1 N. Y. Rev. St. 739; 2, 691; Livingston v. Prosens, 2 Hill, 526. See Mott v. Small, 20 Wend. 212; Webb v. Bindon, 21, 98.

(3) 1 Brev. Dig. 101-2; 1 N. C. Rev. St.

260; Hoppiss v. Eskridge, 2 Ired. Eq. 54.

(4) Wash v. M'Brayer, 1 Dana, 566, 2, 68.

the statute is merely to prevent the transfer of the legal title of land, in the possession of a third person, claiming adversely to the grantor. Edwards v. Parkhurst, 21 Verm. 472.

But a deed, executed while a third person is in possession, adverse to the grantor, conveys to the grantee an equitable title; and, if he commence an action, in the name of the grantor, to recover the possession, his equitable interest will be protected against any interference on the part of the grantor. *Ib.*

The statute of Vermont, which declares conveyances void by reason of adverse possession, is simply in affirmance of the common law; and the decisions at common law are applicable under it. The conveyance is only void, as to the person holding adversely at the time, and those who subsequently come in under him; and, as to all others, it is valid. And, even as against him, the conveyance is so far good between the parties, that a recovery in the name of the grantor or lessor will enure to the benefit of the grantee or lessee. [Bennett, J.] University, &c. v. Joslyn, 21 Vt. 52.

(a) One whose wife may inherit land, from a claimant out of possession, may lawfully maintain the suit of such claimant to recover the land, under an agreement to have the whole avails of the recovery. Accordingly, where a person, claiming title to land which was held adversely, executed a power of attorney to her son-in-law to bring suits in her name for the land, but for his own benefit, it was held, that the transaction was legal. Gileland v. Failing, 5 Denio, 308.

(b) But, for one to enter upon land tortiously, and while in possession, obtain a release of the outstanding title, without collusion, is not an offence against the champerty act, even though he forcibly entered with this purpose. Adams v. Buford, 6 Dana, 411; Chiles v. Jones, 7, 529. Neither party can maintain an action for the land against the occupant; but it has been doubted whether a provision for its forfeiture is constitutional. A champertous deed, made after suit commenced, is no bar. Chiles v. Conley, 9, 387; Sheperd v. McIntire, 5 Dana, 576. A conveyance made to complete a contract which was lawful at the time, is not champertous. Cardwell v. Sprigg, 7, 37. If the sale is abandoned, the grantor may recover the land from the adverse occupant. So also, he may recover it from the grantee. A bill of discovery is the proper process for ascertaining whether a suit is brought for the benefit of the grantee. Chiles v. Jones, 7, 529. To a bill in equity against heirs, for the conveyance or confirmation of land sold by the ancestor, champerty is a good defence. But this ground of application to set aside a deed is not favored in Chancery, especially when made by heirs after great lapse of time. Bryant v. Hill, 9 Dana, 67. See Thruston v. Masterson, *Ib.* 256; Beatty v. Hudson, *Ib.* 322; Wickliffe v. Wilson, 2 B. Monr. 43; Griffith v. Dicken, 2 *Ib.* 23; Chrisman v. Gregory, 4 *Ib.* 480.

In Kentucky, the act of 1824 does not apply to sales made under decrees of court. Little v. Bishon. 9 B. Mon. 240.

devise, or inheritance.(a) The prohibition does not apply to a conveyance in fulfilment of a *bona fide* contract, made prior to any adverse possession.(1) So, in Tennessee, where a person holding lands adversely, assents to the purchase thereof, by a third person, such purchase is not champertous.(2)

51. In Ohio, it seems there is no law against champerty and maintenance. But the purchase of land, from one against whom a suit is pending for it, is void, except against himself, if he prevails. A release passes the title, notwithstanding an adverse possession.(3)

52. In Arkansas, Illinois(b) and Missouri, a deed is valid, though there be an adverse possession.(4)(c)

53. A deed may be avoided by *rasure*, *alteration*, or *interlineation*. The general rule seems to be, that an alteration made by the obligee himself will avoid the deed, whether in a part material or immaterial, or even if advantageous to the other party. But an immaterial alteration by a stranger does not avoid the deed. A writing, indorsed upon the deed at the time of sealing and delivering it, though after the signing, is not an alteration, but a part of the deed.(5)(d)

54. The above principle, that alteration avoids a deed, has been, for the most part, limited to *executory contracts*, and held inapplicable, in its strictness, to *conveyances*, executed either by livery of seizin or the statute of uses, by which an estate actually passes, not liable to be di-

(1) Ten. St. 1821, 72; Sims v. Cross, 10 Yerg. 460; Cardwell v. Sprigg, 1 B. Monr. 370.

(2) McIntire v. Patton, 9 Humph. 447.

(3) Walk. Intro. 297, 351, 352; Hall v. Ashby, 9 Ohio, 96.

(4) Illin. Rev. L. 130; Misso. St. 119; Ark. Rev. St. 189.

(5) Pigot's case, 11 Co. 27; Shep. Touch. 69; Woodward v. Aston, 1 Ventr. 297; Jack-

son v. Malin, 15 John. 293; Speake v. U. S., 9 Cranch, 28; Woolley v. Constant, 4 John 54; Co. Lit. 225 b, n. 136; 1 Rep. in Cha. 100; Magennis v. McCullough, 1 Gilb. R. 236; Flint v. Brandon, 1 N. R. 73; Cutts v. U. S., 1 Galli. 71; Henfree v. Bromley, 6 E. 309; Lyburn v. Warrington, 1 Star. R. 162; Morris v. Vanderen, 1 Dail. 67; Barrett v. Thorndike, 1 Greenl. 73; Johnson v. Bank, &c., 2 B. Monr. 310; Lee v. Alexander, 9 Ib. 25.

(a) In the same State, (Tennessee,) particular provision is made against *champerty*, in the purchase of Indian reservation suits. St. 1827, 78. Where a third person is in possession, under a written assurance, such possession embraces all the land included therein, and a conveyance by an adverse claimant will be void. Pickens v. Delozier, 2 Humph. 400. Otherwise, where the possession is without any writing. Ib. See Bullard v. Capps, 2 Humph. 409. A release of dower, before assignment, to an heir not in possession, is not champertous, it seems. Ross v. Blair. Meigs, 525.

A purchase of slaves in the possession of the vendor, although made with knowledge of an outstanding claim, does not amount to champerty. Dunbar v. McFall, 9 Humph. 505.

(b) But *maintenance*, defined as the *sustaining of another's suit*, is punishable. Illin. Rev. L. 195.

(c) The sale of property not actually in litigation, is not prohibited by the Spanish law, unless the sale be made to some person "more powerful, artful, or obstinate" than the vendor, for the purpose of throwing difficulties in the way of another, who claims it. White v. Gay, 1 Texas, 384.

As the general rule, the same interests which can be conveyed, may also be taken and sold by process of law, and *vice versa*. Hence, in general, an *execution* cannot be levied upon the right of one disseized. It is otherwise in Kentucky. But the interest must be disposed of as *land*, without any estimate of the adverse title. Frizzle v. Veach, 1 Dana, 211. A purchaser from the sheriff cannot sell such title. Violet v. Violet, 2 Dana, 325. In New York, whether adverse possession avoids a sheriff's deed, seems a doubtful point. 4 Wend. 474.

(d) With regard to the annexation of a *schedule*, see Weeks v. Maillardet, 14 E. 568. As to *rasures*, &c., in the record of deeds, see Mass. St. 1844, 289. As to what constitutes *alteration*, see Morrill v. Otis, 12 N. H. 466.

vested by the loss or destruction of the instrument.(a) So, where a blank was left in a deed for the date, which the grantee filled up, but no fraud or imposition was shown; held, the date was an immaterial part of the deed, and the alteration did not avoid it.(1)

55. A deed is said to be avoided, by a stranger's filling a blank with a Christian name, even with consent of the obligor. But the name of a country is held an immaterial alteration. The erasure of the *description* of a party has been held to avoid the deed, though it seems the estate remains.(2) But an alteration, excluding a part of the land, which was included by mistake, has been held not to avoid the deed.(3)(b)

56. In New York it is held, that the alteration of a deed by one claiming a benefit under it is a bar to an action upon such deed, though the alteration, it seems, is immaterial. Otherwise, if by a stranger, without consent of the party. With regard to executed conveyances, where the thing conveyed *lies in grant*; an alteration divests the estate, if made by the party himself, though immaterial.(c) But where a rent, though lying in grant, is created by indenture, each part being executed by both parties; even though the grantee alters his own part materially, yet both the right of action and the estate remain, because the part remaining with the grantor is an original. Where a deed operates by *transmutation of possession*—as in the case of corporeal hereditaments—even a material and fraudulent alteration does not avoid the deed. It may still be offered to prove a right or title created by its execution, as evidence of any collateral fact. But it avoids the covenants, though the deed is over thirty years old.(4)

57. In the same State, where the addition of *junior* in the name of

(1) *Hatch v. Hatch*, 9 Mass. 307; *Whiting v. Daniel*, 1 Hen. & M. 391; *Holbrook v. Tirrell*, 9 Pick. 105; *Farrar v. Farrar*, 4 N. H. 191; *Gilbert v. Bulkley*, 5 Conn. 262; 4, 550; *Hebblewhite v. M'Morine*, 2 Nich. & C. 51; *Chessman v. Whittemore*, 23 Pick. 231; *Herrick v. Malin*, 22 Wend. 388.

(2) Co. Lit. 35 b, u. 7; *Doe v. Hirst*, 3 Star. R. 60.

(3) *Hall v. Chandless*, 4 Bing. 123.

(4) *Lewis v. Payn*, 8 Cow. 71; (*Jackson v. Anderson*, 4 Wend. 474; *Ib.* 585;) *Herrick v. Malin*, 22, 388; *Van Brunt v. Van Brunt*, 3 Edw. 14. *Agriculturist, &c.*, 4 Eng. L. & Equ. 211.

(a) Even where a deed is made without consideration, being good at law, if lost before registration, Chancery will set it up, and decree the execution of a new conveyance. *Plummer v. Baskerville*, 1 Ired. Equ. 252.

(b) Power of attorney, appointing "B" to be the attorney. It was delivered to Henry B, the party really intended; who inserted the Christian name. Held, the instrument was not hereby invalidated. *Eagleton v. Gutteridge*, 11 Mees. & W. 465. Land, upon which were a well and pump, was conveyed by metes and bounds, without mentioning them, and the words "with pump and well of water" were afterwards interlined. Held, as the words did not change the legal effect of the deed, the alteration was an immaterial one. *Brown v. Pinkham*, 18 Pick. 172.

A sheriff, after going out of office, amended a deed given by him while in office, but the amendment created no new right. Held, the deed was not thereby affected. *Flemming v. Powell*, 2 Texas, 225.

After a deed had been acknowledged by a wife, the husband, with consent of the grantee, made an alteration, describing the number of acres conveyed, and in the covenant of warranty, purporting to be joint, warranted the conveyance of this number of acres. Held, the alterations did not change the legal effect of the deed as to the wife, and therefore did not violate it. *Shelton v. Deering*, 10 B. Mon. 405.

(c) In other words, where the estate *may not have a legal essence* without deed, a rasure avoids it. Otherwise, though the deed itself may be thus avoided, the estate remains. *Miller v. Manwaring*, Cro. Car. 399.

Where a deed was altered by the erasure of a condition, and the grantee conveyed the land: held, no title passed. *Marr v. Hobson*, 9 Shani 321.

the grantee was repeatedly altered by him, this was held not to divest his title to the land.(1)

58. So, in Pennsylvania, it is held that an alteration destroys *the deed* in relation to the grantee, but not *the estate*; that no action lies on the *covenants*, but *the title* is not divested.(2)(a) So where a deed, made subject to the payment of ground rent, after complete execution and delivery, was, on application of the scrivener of the grantor, left with him, the grantor desiring it to be recorded, and material words were afterwards interlined by the grantor or by his agency in a blank space, left originally in the deed; held, that a subsequent *bona fide* purchaser of the rent could not recover from the grantee the arrears.(3)

59. There seems to be a conflict of authorities upon the question, whether, an interlineation shall be presumed to be made at the time of, or after the conveyance, in the absence of express evidence either way. It is the usual and proper course, to notice in the attestation any interlineation made at the time. It is said, an authority to alter a deed is not to be implied; and the erasure or interlineation of a deed in a material part is a suspicious circumstance, to be explained by the party claiming under it. The sufficiency of such explanation is a question for the jury. In New Hampshire, a material alteration is *prima facie* fraudulent, and presumed to be made by the grantee; and an assignee, with notice, and without consideration, cannot avail himself of the deed, nor supply its defects by parol evidence. The same doctrine has been held in New York, though somewhat opposed to an earlier case. So in Illinois. So it has been held by the United States Court, that a rasure is presumed to be made after execution, and avoids the deed. But, in New Jersey, an interlineation or alteration is presumed to be made before execution of the deed, more especially if evidently against the party's interest. So in England, with an erasure or interlineation.(4)(b)

60. It was formerly held, that the breaking off or obliteration of the seal avoided a deed, unless done by the party bound. But it is now well settled, that where the loss of the seal is shown, even presumptively, to have occurred by time or accident, it does not avoid the deed.

(1) Jackson v. Gould, 7 Wend. 364.

(2) Withers v. Atkinson, 1 Watts, 236.

(3) Wallace v. Harnstad, 15 Penn. State R. 162.

(4) Den v. Farlee, 1 N. J. 279; Fitzgerald v. Fauconberg, Fitzgib. 207; Doe v. Bingham, 4 B. & A. 672; Trowel v. Castle, 1 Keb. 22; Morris v. Vanderen, 1 Dall. 67; Jackson v.

Osborn, 2 Wend. 555; Chesley v. Frost, 1 N. H. 145; Prevost v. Gratz, 1 Pet. Cir. 364; Herrick v. Malin, 22 Wend. 388; Van Brunt v. Van Brunt, 3 Edw. 14; North, &c. v. Shrewsbury, &c., 2 N. J. 424; Tatham v. Catamore, 5 Eng. L. & Equ. 349; Acker v. Ledyard, 8 Barb. 514; Wallace v. Harnstad, 15 Penn. 462; Walters v. Short, 5 Gilm. 252.

(a) In the same State, an interlineation in a certificate of acknowledgment does not avoid a deed; although it may go to the proof of its execution. Devinney v. Reynolds, 1 Watts & S. 328. If a deed (obligation) is joint or joint and several, and the seal of one of the signers torn off, the other may defend against an action. Otherwise, if merely several. Rittenhouse v. Levering, 6 Watts & S. 190.

(b) A sold and conveyed a tract of land to B. Afterwards A purchased back the land from B, paid him for the same, and took possession; B, at the same time, delivering up to A, to be cancelled, the deed which had been executed to him by A, and which had not been recorded. No conveyance was executed by B to A. Held, that the legal title to the land remained in B. Held, also, that a judgment rendered against A after said deed was delivered up to him, to be cancelled, was not a lien on the land. Orth v. Jennings, 8 Blackf. 420.

Thus, where the seal was proved to have been torn off by a child, and the fragments matched with the deed, held, the deed was still good.(1)

61. If a deed is either delivered up to the maker to be cancelled, and actually is cancelled, or the holder cancels it by agreement with him, it becomes void. It has been held in New Hampshire, that in such case the title revests in the grantor.(2)

62. A mere agreement to cancel, not executed, cannot operate as a reconveyance. Nor will, in general, the surrender or cancelling of a deed divest the estate which has once vested.(3)

63. Where A settled on his wife £100, by a deed duly executed, which he afterwards cancelled, and it was so found after his death; held, the instrument was still good. And the principle applies even to things which lie in grant.(a) In such case the only question is, whether the grant was made. The making of it may be proved by the best evidence, which is first the deed itself, or, if that be destroyed, secondary proof. Ch. J. Eyre said, "God forbid that a man should lose his estate by losing his title deeds." Upon this principle, it may be averred in pleading, that a deed was cancelled by the destruction of the seal, and that part of the deed lost; with a profert of the residue.(4)

64. Where a seal is torn off before issue, it is said *non est factum* may be pleaded, or the party may demur upon oyer.(5)

65. If A, B and C covenant *jointly and severally*, and A's seal is torn off, the rest may plead *non est factum*. If they covenant severally, otherwise.(6)

66. A conveyed to B. B's deed was not recorded, but he occupied the land, and sold it to C, and A's deed was restored to him and cancelled, and A gave to C a new deed, which was recorded. Subsequently, D, a creditor to B, levies an execution upon the land. Held, C's title should prevail over D's.(7)

67. Where a grantor surreptitiously obtains his own deed, under pretence of procuring it to be recorded, and makes a second convey-

(1) Mathewson v. Lydiate, Cro. Eliz. 408; Seaton v. Henson, 2 Show. 29; Nichols v. Haywood, Dyer, 59 a; Argol v. Cheney, Palm. 402.

(2) Touch. 70; Tomson v. Ward, 1 N. H. 9; see Goucher v. Martin, 9 Watts, 111; Halcombe v. Ray, 1 Ired. 340; Adams v. Buford, 6 Dana, 408; Crump v. Black, 6 Ired. Equ. 323.

(3) Morse v. Child, 6 N. H. 521; Leech v. Leech, 2 Cha. R. 52. See Shackelford v. Smith, 5 Dana, 234; Schutt v. Large, 6 Barb. 373; Connelly v. Doe, 8 Blackf. 320.

(4) Bolton v. Carlisle, 2 H. Black. 259.

(5) Co. Lit. 36 b, n. 7.

(6) Ib.

(7) Holbrook v. Tirrell, 9 Pick. 105.

(a) Another authority says, that where a thing may pass without deed, as in case of feoffment, or lease; a rasure does not destroy the estate. But an interlineation by the lessee avoids a lease. Co. Lit. 35 b, n. 7. (See sec. 56.)

If a deed is made in consideration of a bond from the grantee, which is subsequently cancelled by her, being a married woman; this does not revest the title in the grantor, or defeat the husband's estate. Murphy v. Herbert, 16 Penns. 50.

Trespass *quæ claus*. The plaintiff offered in evidence an office copy of the levy of an execution upon the premises in question. The defendant thereupon produced the original levy, as returned on the execution, in which were material alterations and interlineations, affecting the boundaries of the land set off; and objected to the admission of the copy in evidence, until such alterations should be explained. Held, the copy was admissible, and the burden of explaining the alterations was not on the plaintiff. Wilbur v. Wilbur, 13 Met. 405.

ance to one having notice of the first, the title of the former grantee shall prevail. On the other hand, where a deed is redelivered to the grantor to be cancelled, and the grantee fraudulently procures and records it, he may pass a title to an ignorant purchaser.(1)

68. Two deeds were made by A to B, at or near the same time, for the same consideration and purpose, of the same tenor, but of different dates, but not recorded. B gives up the last deed to be cancelled. The first is not valid without a new delivery. But, if A takes away and destroys one deed, without B's consent, the other is good.(2)

69. Where a deed is cancelled, and redelivered to the grantor, without registry, the land may still be attached or conveyed, as the property of the grantee. But if the grantor, in such case, reconvey to one ignorant of the former deed, or with the consent of the first grantee, and without fraud, the second deed shall prevail.(3)

70. A father made a deed to his son, and delivered it to a third person, to be kept till called for. He afterwards reclaimed and cancelled the deed. Held, no title vested in the son, though he occupied with the father.(4)

71. Where blanks were left in a deed, which were afterwards filled up, and the deed delivered by an agent, it was held good.(5)

72. It is not necessary that attesting witnesses state, that blanks in a deed were filled at the time of executing it.(6)

73. Where a deed is cancelled for a particular purpose, which fails, it will not be thereby avoided. Thus, where a tenant for life, having leased under a power, took a surrender of the lease, and gave a new one, which was void; held, the lessee might set up the first lease against the remainder-man, after the death of the tenant for life.(7)

74. Delivery of a deed to the grantor, in order that he may acknowledge it, is no surrender of the grantee's title.(8)

75. Any addition or alteration in a deed, as adding or erasing the name of an obligor, if made with the consent of all parties, does not avoid the deed.(9)

76. But it has been held, in Connecticut, that any material alteration in a deed, after execution and acknowledgment, though made by consent, is void, unless there is a new attestation by two witnesses.(10)

77. Where a deed was given, and a bond back, for the price of the land, a redelivery of the former, and cancellation of the latter, were held to revest the title as between the parties. And in such case, if the grantee marries the grantor, and thereby gets possession of the land and the deed, this does not restore his estate.(11)

78. Although the cancelling of a deed does not revest the title in the grantor, yet, if the grantee, voluntarily, and under no mistake, consent to the destruction of the deed, with a view to revest the title, he

(1) *Davis v. Spooner*, 3 Pick. 284; *Dana v. Newhall*, 13, 498.

(2) *Corliss v. Corliss*, 8 Verm. 373.

(3) *Marshall v. Fisk*, 6 Mass. 24; *Hatch v. Hatch*, 9, 307; *Comm. v. Dudley*, 10 Mass. 403.

(4) *Maynard v. Maynard*, 10 Mass. 456.

(5) *Texira v. Evans*, 1 Anst. 229. (But see *Revett v. Brown*, 5 Bing. 7.)

(6) *England v. Roper*, 1 Star. R. 304.

(7) *Koe v. Archbishop, &c.*, 6 E. 86

(8) *Rootes v. Holliday*, 6 Munf. 251; *Cutts v. U. S.*, 1 Gall. 69; 6 Mass. 24; *Conway v. Deerfield*, 11, 332, 9, 311; *Dana v. Newhall*, 13, 498; *Davis v. Spooner*, 3 Pick. 284.

(9) *Speake v. U. S.*, 9 Cranch. 28.

(10) *Coit v. Starkweather*, 8 Conn. 289.

(11) *Wiley v. Christ*, 4 Watts, 496.

will not be allowed to avail himself of such deed by offering parol proof of its contents; and thus, in effect, he will lose his estate.(1)

79. It is not unusual for statutes to provide, that written instruments, made not conformably to their requirements, shall be *void*. The term *void*, however, has sometimes received a qualified construction, by reference to the object of the statute. Thus, where an act provides, that certain deeds, not made according to the terms therein prescribed, shall be "utterly void, and of none effect, to all intents, constructions and purposes;" still, if the plain object of this prohibition is to protect third persons, the deed shall be void only against such third persons, and good against the grantor. So held in the case of *leases by ecclesiastics* in England.(2)

80. A grantor cannot avoid his deed, because it was made on Sunday.(3)

81. In Massachusetts, a statute prohibited the doing any manner of labor, business or work, between the midnight preceding and the sun-setting of the Lord's day, and declared void the execution of any civil process, from midnight preceding to midnight following that day. Held, this act did not avoid, as against creditors, a deed executed, acknowledged and recorded after sunset on Sunday evening.(4)

CHAPTER LXXXIX.

FRAUDULENT CONVEYANCES, AND REGISTRY.

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| 1. Deeds wholly or partially void. | 34. Amount of debts—subsequent creditors. |
| 2. English and American statutes. | 37. Who is a <i>creditor</i> . |
| 9. In affirmance of the common law. | 40. Fraud, how proved. |
| 10. Evidences of fraud. | 41. Fraudulent deed, good between the parties. |
| 13. Subsequent purchaser—notice. | 42. But void for the whole, if void in part. |
| 16. Indebtedness, whether conclusive proof of fraud. | 43. Acknowledgment and registration of deeds, in the Northern States. |
| 17. Whether the property must be subject to execution. | 95. In the Middle States. |
| 19. <i>Bona fide</i> subsequent purchaser. | 151. In the Southern States. |
| 21. Conveyance to or for wife or children. | 204. In the Western States. |
| 28. Trusts. | |

1. IN the last chapter, we considered the grounds upon which a deed is *void* or *voidable*. The reasons there referred to, for avoiding a deed, operate *between the parties themselves*, and render the instrument of no effect *for all purposes whatever*. It remains to speak of deeds which, though good between the parties, are *void as to third persons*, acquiring an interest in the land.(a) Under this head are to be classed *fraudulent*

(1) *Farrar v. Farrar*, 4 N. H. 191.

(2) Co. Lit. 45 a.

(3) *Swisher v. Williams, Wright*, 754.

(4) *Tracy v. Jenks*, 15 Pick. 465.

(a) See *Lowry v. Orr*, 1 Gilm. 70. On the other hand, a deed may be void or voidable between the parties, and valid as against third persons; as in most cases referred to in the last chapter. The following case illustrates the same principle.

Trespass for cutting timber on the plaintiff's land. Defence, a power of attorney from his

conveyances, that is, conveyances injurious to creditors of the grantor; and conveyances not *acknowledged* or *proved*, and *recorded*, according to law.

2. By Statute 13 Eliz. c. 5, sec. 2, all conveyances of real estate, or of any profit or charge arising therefrom, notwithstanding any feigned consideration, use, &c., are made void only against creditors, whose actions are thereby hindered or defrauded. By Statute 27 Eliz. c. 4, (30 Eliz. c. 18,) conveyances made with intent to defraud subsequent purchasers of the same land, &c., from the grantor, are made void only as against such subsequent purchasers.(a)

3. These acts are substantially re-enacted in Illinois, Virginia, Vermont, and probably some other States.(1)(b)

4. In North Carolina, fraudulent conveyances, judgments and executions are void as against the party defrauded, whether a creditor or purchaser. The parties to a fraud are liable to a forfeiture of the value of the land, whether they undertake to enforce the transaction at law, or transfer the land to some third person. A *bona fide* purchaser for consideration is protected.(2)(c)

5. In Indiana,(3) any party to a fraudulent conveyance is subjected to a fine and to double damages; but his answer in a Chancery suit shall be no evidence against him in a subsequent prosecution.

6. In Ohio and Maine, such conveyance is made a crime. So, a conveyance with intent to defraud, by one without a title. In the latter State, lands fraudulently conveyed by one deceased are made subject to debts.(4)

7. In Missouri, fraudulent conveyances are made void; but not, if recorded, against a second purchaser, or where the second purchaser had notice, unless the first was privy to the fraud; nor against a *bona fide* purchaser from the first grantee.(5)

8. In New York, a conveyance, made with the intent to defraud prior or subsequent purchasers for valuable consideration, is void,

(1) Illin. Rev. L. 313; 1 Vir. Rev. C. 15; Code 507; Verm. Rev. St. 315.
(2) 1 N. C. Rev. St. 287, 8, 90.

(3) Ind. Rev. L. 189.

(4) Walk. 350; Me. Rev. St. 691, 473.

(5) Misso. St. 283, 4.

grantor, and that, at the time of conveyance the grantor was *non compos*, and the deed fraudulent. Held, evidence of these facts was not admissible. *Wetherhouse v. Maxwell*, Law Rep. July, 1841, p. 120.

(a) A late English act, (3 & 4 Wm. IV, c. 27, sec. 26,) provides, that property shall not be reclaimed, on the ground of a fraudulent transfer, from a *bona fide* purchaser, for consideration, not aiding nor having notice of the fraud. See *Jones v. Powles*, 3 My. & K. 581.

(b) By a statute in Massachusetts—1844, 289—whenever any debtor purchases, or directly or indirectly pays the price of, real estate, and, to defraud his creditors, either the title is retained by the vendor, or conveyed to some other person, the property is liable to legal process as the debtor's. If attached, to make the attachment valid against a subsequent attachment or purchase, the officer must briefly describe the property in his return, and the name of the nominal owner; and if the latter is in possession, an action must be brought by the creditor for the land within a year after return of the execution. In New Hampshire, there is a statute against fraudulent conveyances. Rev. St. 438.

(c) In this State, where both the vendor and vendee of certain slaves, supposed that the former had only a life interest therein, when in fact he had the absolute title, worth ten times as much as a life estate; held, parol evidence was admissible of the mistake, and the conveyance was not void against creditors. *Runyon v. Leary*, 4 Dev. & B. 231. A second purchaser cannot avoid the former fraudulent conveyance, unless he purchased *bona fide* and for a fair price, and this is said to be a question of law, not of intent. *Fullenwider v. Roberts*, Ib. 278.

unless they had actual or legal notice of the fraud at the time of purchase; and even then, if the first grantee or party to be benefitted was privy to the fraud. A conveyance, reserving a power of revocation or alteration, is void against subsequent purchasers. It is declared a misdemeanor, to be party or privy to a fraudulent conveyance. But mere want of consideration does not render a deed fraudulent.(1)

9. It has been held that the statutes against fraudulent conveyances are in affirmance of the common law, so far as they relate to conveyances made with a fraudulent intent.(2)

10. In an early and leading case upon this subject,(3) three circumstances were enumerated as badges of fraud. 1. That the gift was general, including the grantor's whole property; even his apparel. 2. Continued possession(a) of, and dealing with, the property by the grantor. 3. A trust between the parties.(4)(b)

11. Merely preferring one set of creditors to another, does not constitute a conveyance fraudulent.(5)

12. But it is said, fraud generally consists in an intention to secure some interest or future right to the grantor, or an unjust preference of one creditor, in violation of the bankrupt law.(6)

13. It has been held in England, that a subsequent purchaser shall hold against a voluntary deed, though he had notice of such deed. But this is said to be a severe construction of the act, and has been questioned. In New York it has been held, that a purchaser, with *implied* notice, shall hold the land; but that the former deed may be rendered valid by some act intervening between the two.(c) In the United States Court, a subsequent conveyance is held to be presumptive, but not conclusive evidence of a fraudulent intent in the former one. The late English doctrine above referred to is not adopted. The prevailing American rule would seem to be, that voluntary *bona fide* deeds are valid against subsequent purchasers.(7) In Pennsylvania, a subsequent purchaser, with notice, cannot hold the land.(8)(d)

(1) 2 N. Y. Rev. St. 134, 137, 690.

(2) *Sands v. Codwise*, 4 John. 536; 4 Kent, 462; *Hamilton v. Russell*, 1 Cranch, 316; Co. Lit. 76 a, 290 b.

(3) *Twine's case*, 3 Rep. 80.

(4) 1 Roll's Rep. 3; *Bank, &c. v. Housman*, 6 Paige, 526; 2 Cow. 431, 3, 166; 6 Watts, 151; 6 N. H. 67; 4, 309.

(5) *Estwick v. Caillaud*, 5 T. R. 420; 5 Cow. 547.

(6) *Northampton, &c. v. Whiting*, 12 Mass. 110.

(7) *Buckle v. Mitchell*, 18 Ves. 110; *Pulvertoft v. Pulvertoft*, Ib. 88-9; *Hudnal v. Wilder*, 4 McCord, 294; *Doe v. Manning*, 9 E. 59; 4 Kent, 462; *Sterry v. Arden*, 1 John. Cha. 261; *Cathcart v. Robinson*, 5 Pet. 264; *Jackson v. Town*, 4 Cow. 603-4; *Ricker v. Ham*, 14 Mass. 139. See *Dev. v. Roberts*, 4 Dev. & B. 278.

(8) *Foster v. Walton*, 5 Watts, 378.

(a) This circumstance is chiefly, though not wholly, applicable to conveyances of chattels. More especially, where registration is practised, the continued possession of a grantor of land is of little importance.

(b) Held, in Massachusetts, to be only evidence of fraud, open to explanation. *Oriental, &c. v. Haskins*, 3 Met. 332.

(c) So, in Massachusetts, a fraudulent conveyance, being only voidable, may be made good by a subsequent abandonment of the fraudulent intent, and a confirmation of the deed, *bona fide*, for good and adequate consideration. Ib.

(d) A fraudulent conveyance being good against the grantor and his heirs, if they make a subsequent deed to one having actual or implied notice of the former one, the second purchaser, in order to maintain his title, must prove that he bought for a valuable consideration. *Clapp v. Tirrell*, 20 Pick. 247. And, to prove this point, the usual consideration clause is regarded as the weakest kind of *prima facie* evidence. Ib.

14. Where a consideration is paid, the grantee must know or participate in the fraudulent design, to render the deed void. And actual fraud of the grantee avoids the conveyance, whether the sale be private or judicial. The sale is null and void to all purposes.(1)

15. But, without any reference to the intentions of the grantor, the part taken by the grantee, and his acts, may be held fraudulent.(2)

16. It has been held in New York and New Jersey, that where a grantor is indebted, his deed is presumed to be fraudulent, whatever may be the amount of his debts or of the property conveyed, or the circumstances of the party. But in New York a late case decides, that a voluntary deed is not absolutely void, though the grantor is indebted to a small amount, except under certain circumstances; and that the question is for a jury to settle.(a) And this seems to be now the prevailing American doctrine. Judge Story remarks, that the rule formerly adopted in New York is *strictissimi juris*; and that indebtedness alone does not avoid a conveyance. The condition, state and rank of the parties are to be regarded; and the act must have a direct tendency to impair the rights of creditors. Chancellor Kent, though admitting this to be now the law, expresses himself strongly in favor of the ancient and strict rule. This rule is also still adhered to in North Carolina.(3)

17. To render a deed fraudulent as to creditors, the property conveyed must be such as is liable to execution. But whether this rule is adopted in Chancery, which has the power of reaching property not subject to legal process, seems a doubtful point.(4)

18. A conveyance by husband and wife of her land, though without consideration, if it does not under the circumstances affect any interest of the husband, which would be liable to his creditors, is not fraudulent.(5)

19. It is the settled American doctrine, that a *bona fide* purchaser for valuable consideration, either from a fraudulent grantor or grantee, shall hold the land; and, in this respect, there is no difference between deeds

(1) *Bridge v. Eggleston*, 14 Mass. 245; 12, 456. See *Goodwin v. Hubbard*, 15, 210; *Ricker v. Ham*, 14, 137; *Sands v. Codwise*, 4 John. 536; *Ibid.* 598; *Gilbert v. Hoffman*, 2 Watts, 66; *Edgall v. Lowell*, 4 Verm. 405; *Worseley v. Demattos*, 1 Burr. 474-5; *Howe v. Ward*, 4 Greenl. 195; *Ratcliff v. Trimble*, Mon. 32.

(2) *Jackson v. Mather*, 7 Cow. 301.

(3) *Reade v. Livingston*, 3 John. Cha. 481; *Den v. De Hart*, 1 Halst. 450; *Seward v. Jackson*, 8, 406; *Jackson v. Peck*, 4 Wend. 300; *Brckett v. Waite*, 4 Verm. 389. See also *Sexton v. Wheaton*, 3 Wheat. 229;

Hinde v. Longworth, 11, 199; *Thomson v. Dougherty*, 12 S. & R. 448; *Parker v. Proctor*, 9 Mass. 390; *Meserve v. Dyer*, 4 Greenl. 52; *Hudnal v. Teasdall*, 1 McCord, 227; *Bank, &c. v. Housman*, 6 Paige, 526; *Van Wyck v. Seward*, *Ib.* 62; 1 Story's Eq. 343-60; 4 Kent, 442, n.; *O'Daniel v. Crawford*, 4 Dev. 197.

(4) *Legro v. Lord*, 1 Fairf. 161; 1 Story's Eq. 361; *Atherly*, 220; 4 John. Cha. 450; 5, 280; 20 John. 554; 1 Hopk. 59; *Otley v. Lines*, 7 Price, 274. See 5 Cow. 67.

(5) *Hubbard v. Rewick*, 1 Fairf. 140.

(a) In several cases in New York, verdicts have been set aside as against evidence. *Jackson v. Mather*, 7 Cow. 301; *Jackson v. Parker*, 9, 73. In Massachusetts, the court will not adjudge a conveyance fraudulent, upon a statement of the facts relied on for this purpose. The question is for a jury. *Marden v. Babcock*, 2 Met. 99; *acc. Gann v. Butler*, 18 Pick. 248.

made to defraud subsequent *creditors*, and those made to defraud subsequent *purchasers*.(1)

20. But, where a fraudulent grantee mortgages to his creditor without notice to secure an existing debt, such creditor is postponed to a creditor of the grantor, claiming under a judgment prior to the mortgage, though subsequent to the first deed.(2)(a)

21. A voluntary settlement upon a *wife* is void as to creditors. But not a settlement for which the husband receives an equivalent from her property. Her release of dower is a sufficient equivalent. It is not the release of a mere *possibility*, but of a contingent interest. So, where a wife renounces her jointure, this makes her a *bona fide* purchaser from the husband of other land; although a jointure, as well as dower, is a contingent interest.(3)(b)

22. A husband mortgaged his land, and the wife released her dower therein, and in consideration thereof the husband conveyed to her the equity of redemption. He afterwards made another mortgage of the land. Held, this mortgage should prevail over her title.(4) This case, however, has been questioned.(5)

23. The fact, that a wife releases only a life interest, while she takes from the husband an estate in fee, does not avoid the transaction. It is in effect the same as a conveyance to her, with a further settlement upon children. The comparative value is a proper point for consideration.(6)

24. In South Carolina, it is held that a voluntary deed in favor of a wife, &c., is valid against subsequent purchasers with notice, but void as to creditors at the time, if the husband is *largely indebted*. Whether a deed to a child is void as against creditors at the time, depends upon circumstances. If *bona fide*, it is good against subsequent creditors, even those without notice. Possession by the grantor, if the child live with him, is no badge of fraud. A small amount of debt does not avoid

- (1) *Anderson v. Roberts*, 18 John. 515; *Bean v. Smith*, 2 Mas. 252; *Bridge v. Eggleston*, 14 Mass. 245; *Martin v. Cowles*, 1 Dev. & Bad. 29; *Somes v. Brewer*, 2 Pick. 184; *Thompson v. McLean*, 1 Ashm. 129; *Violett v. Violett*, 2 Dana, 324; *Hood v. Fahnestock*, 8 Watts, 489; *Parkman v. Welch*, 18 Pick. 231; *Buffalow v. Buffalow*, 2 Dev. & B. 241.

(2) *Manhattan, &c. v. Evertson*, 6 Paige, 457.

(3) 2 Kent, 139, 145; *Bullard v. Briggs*, 7

Pick. 538-9; *Scot v. Bell*, 2 Lev. 70; *Id.* 146. See *Jones v. Croucher*, 1 Sim. & St. 315; *Toulmin v. Buchanan*, 1 Stew. 67; *Neufville v. Thomson*, 3 Edw. 92; *Wickes v. Clark*, 8 Paige, 161; *Smith v. Green*, 3 Humph. 118; *Hill v. West*, 8 Ohio, 222.

(4) *Dolin v. Coltman*, 1 Vern. 294.

(5) *Atherley*, 162. (See *Ward v. Shallet*, 2 Ves. 16.)

(6) *Bullard v. Briggs*, 7 Pick. 541.

(a) An assignee for benefit of creditors has not the rights of a subsequent purchaser, in defeating a prior fraudulent conveyance. He stands in no better situation than the assignor himself. *Holland v. Cruft*, 20 Pick. 321. But one claiming under a sale made by authority of law stands, in relation to a prior voluntary conveyance, like a second purchaser from the debtor himself. Thus, where A, one of several heirs, made a voluntary deed, the others prayed for partition, a sale was thereupon decreed, and a conveyance made by a master; held, the master was to be regarded as an agent of A, and the former conveyance was defeated. *Latta v. Morrison*, 1 Ired. 149.

(b) In North Carolina, a post-nuptial settlement, exceeding in value the provision made by marriage articles, is void against creditors, and cannot be sustained by an ante-nuptial parol agreement. *Saunders v. Ferrill*, 1 Ired. 97. But, in Massachusetts, an assignment by a husband, of his wife's distributive share of her father's estate, in the hands of her guardian, in trust for her separate use for life, and then for that of her children, is not fraudulent as to his creditors. *Gassett v. Grout*, 4 Met. 486.

the deed. A deed is good against subsequent creditors with notice, though the grantor keep possession.(1)

25. A conveyance, made in consideration of the grantee's supporting the family of the grantor, is void as to creditors.(2)(a)

26. Conveyance by a father to his son, the son agreeing to support the father for life. The son died insolvent, having previously mortgaged the land to the father for fulfilment of this promise. Held good, against creditors of the son.(3)

27. A, a female, in contemplation of a marriage with B, conveyed to him her land, for no other consideration. The parties were in form married, but the marriage was void, B having a wife living at the time. B reconveyed the land to A without consideration. Held, such reconveyance was valid against the creditors of B.(4)

28. Where land is conveyed, subject to a parol trust, and the trustee makes a conveyance to prevent the land from being taken by his creditors; parol evidence is not admissible, that such conveyance was made in execution of the trust.(5)

29. But, where one conveys in trust for his wife, without any written declaration of trust, and his creditors levy upon the land; the trust, and also a valuable consideration therefor, may be shown by parol evidence.(6)(b)

30. If A bargain for land with B and pay the price agreed; and at A's request, but with no fraudulent intent, the deed is made to C, C's title is good. So, if it was intended that C should hold in trust for A, but no writing was made to that effect, still a creditor of B cannot impeach

(1) *Hudnal v. Wilder*, 4 M'Cord, 294; *Howard v. Williams*, 1 Bai. 575, 585, n.; *M'Elwee v. Sutton*, 2 Bai. 128; *Madden v. Day*, 1 Bai. 587; *Condery v. Zealey*, 2, 205; *Van Wyck v. Seward*, 6 Paige, 62; *Hinde v. Longworth*, 11 Wheat. 213; *Chambers v. Spencer*, 5 Watts, 404; *Waterbury v. Sturtevant*, 18 Wend. 353; *Kimball v. Fenner*, 12 N. H. 248.

(2) *Jackson v. Parker*, 9 Cow. 73.

(3) *Tyler v. Carlton*, 7 Greenl. 175. See *Usher v. Hazeltine*, 5, 471; *Hinde v. Vattier*, 1 M.L. 116; *Doe v. Close*, 1b. 282.

(4) *Forbush v. Willard*, 10 Pick. 42. See *Williams v. Thompson*, 13 Ib. 298.

(5) *Smith v. Lane*, 3 Pick. 205.

(6) *Bullard v. Briggs*, 7 Pick. 533.

(a) By indenture between A, and B, his son, A, for pecuniary consideration, conveyed his farm to B with warranty, B covenanting to support A when he should be unable to support himself, to pay certain legacies, and that his several undertakings should be "considered as a charge and lien" on the land, and "have the effect, in law, to charge the same real estate, as a mortgage security." A, during his life and while able to labor, to have the right of occupying the farm as before, and any debts, due from him at his death, to be paid by B from his personal estate. A never entered as upon a mortgage, or gave any notice that he held for condition broken. Held, as the deed indicated a pecuniary consideration, and imposed some burdens upon B, the court would not pronounce it fraudulent *per se* and void; but it would be so, if A's whole estate was conveyed, if he was at the time in debt, and if the deed tended to defraud and defeat or hinder creditors. *Gunn v. Butler*, 18 Pick. 248. Held, the contract, if valid, gave no title to A, which could be reached by his creditors. 1b.

A father conveyed his life estate in certain land to his son, on condition, that, whereas the son had agreed to support him during his life, and the father wished to keep possession in order to secure such support, the deed should be void if the son should fail to furnish it, or disturb the father in his peaceable possession. Held, such deed was not *per se* fraudulent against creditors, but might be explained; and that the provision, relating to the father's support and his remaining in possession, was a condition, and not a reservation, which defeated the grant. *Slater v. Dudley*, 18 Pick. 373.

(b) Husband and wife conveyed to trustees, in trust to reconvey to them. Such reconveyance was afterwards made, upon the expressed consideration of a desire to provide for the husband, and the sum of one dollar. Held valid, no fraud or influence being proved. *Lewis v. Baldwin*, 11 Ohio, 352.

C's title, because the trust may be validly declared afterwards; or A. may confide in C's verbal promise, and the question is merely *between them*. In such case, the question of fraud is for the jury; and, in settling it, the amount of the consideration is a material fact.(1)

31. It has been held in Maine, that where a father conveys to his son his right of redeeming an equity sold on execution, without consideration, for his own benefit, and furnishes the money to redeem with; the creditors of the father may take such equity after it is redeemed, as it reverts in the father.(2)

32. But where a person, having conveyed absolutely, but as security for a debt, upon payment of the debt takes a reconveyance in the name of a third person, for his own benefit, this is good against his creditors.(3)(a)

33. It is held in New Hampshire, that an absolute conveyance, made to secure a debt, with the understanding that upon payment thereof the land shall be reconveyed, is void as against creditors. But, in Maine, *actual fraud* must be proved.(4)

34. In England it seems to be held, that a grantor must owe debts at the time to the extent of insolvency, in order to avoid the deed under St. 13 Eliz. But, in Massachusetts, in order to avoid a deed for want of consideration or a secret trust, it is sufficient to prove that the grantor was deeply in debt.(5)

35. With regard to *subsequent creditors*, a voluntary conveyance is void if made with fraudulent views. In England, a settlement is never declared valid, where the party is largely indebted, and subsequent creditors apply for relief. If a deed is set aside as fraudulent, subsequent creditors come in.(6)

36. Where a creditor, whose demands were incurred partly before and partly since the conveyance, joins them in one suit, he stands as a subsequent creditor.(7)

37. In Maine, one against whom a trespass has been committed is not a creditor before judgment. But, in Massachusetts, New York and Connecticut, one holding a claim for unliquidated damages, for a *tort*, is a creditor, in whose favor a deed may be avoided.(b) But, it is said, an unbroken guarantee, a warranty of title to land, &c., are not

(1) Bullard v. Briggs, 7 Pick. 537-8.

(2) Legro v. Lord, 1 Fairf. 161.

(3) Reed v. Woodman, 4 Greenl. 400.

(4) Smith v. Lowell, 6 N. H. 67; Winkley v. Hill, 9, 31; Reed v. Woodman, 4 Greenl. 400.

(5) Shears v. Rogers, 3 Barn. & Adol. 362; Parkman v. Welch, 19 Pick. 231.

(6) Reade v. Livingston, 3 John. Cha. 501; Damon v. Bryant, 2 Pick. 411; Howe v.

Ward, 4 Greenl. 195; Sexton v. Wheaton, 8 Wheat. 229; Hinde v. Longworth, 11, 199; Benton v. Jones, 8 Conn. 186; Richardson v. Smallwood, 1 Jac. 552; Wadsworth v. Havens, 3 Wend. 411; Smith v. Lowell, 6 N. H. 67; Lewis v. Love, 2 B Monr. 346; Parsons v. McKnight, 8 N. H. 35.

(7) Reed v. Woodman, 4 Greenl. 400; 5, 471.

(a) A purchases lands with the money of B, and takes a deed in his own name, to protect them from B's creditors. Held, they were not liable to be seized by a creditor of B. Howe v. Bishop, (Mass.) Law Report. Jan. 1842, p. 356.

(b) The holder of a mortgage, given to secure a negotiable note, not being in possession, assigned the mortgage, pending an action of slander against him, for the purpose of more effectually defeating a judgment therein. He afterwards died insolvent, and his administrator, *bona fide*, and for valuable consideration, assigned the mortgage. Held, the former assignment was fraudulent and void, and the second assignee took a valid title. Clapp v. Leatherbee, 18 Pick. 131.

subsisting *debts*, which *per se* avoid the deed, but actual fraud must be proved.(1)

38. One joint surety is a creditor of another at the time of executing the obligation.(2)

39. Where one claims under a deed, he need only prove the execution, delivery and registration thereof, if it purport to be for valuable consideration, though the same evidence shows the grantor to have been in failing circumstances. A creditor, claiming the land under legal process against the grantor, must prove want of consideration and legal fraud.(3)

40. To prove a fraudulent intent, evidence is admissible of the grantor's prior acts and declarations; but it will have no effect, unless knowledge on the part of the grantee is also proved.(4)

41. It has been already intimated, (sec. 1,) that a deed fraudulent as to creditors is good between the parties. Thus, the grantor's heirs are bound by it. So a vendee cannot resist payment of a note given for the price of the land, on the ground that the conveyance was fraudulent. So a wife, joining the husband in a fraudulent conveyance, loses her dower, though the deed is avoided as to creditors.(5)(a)

42. A deed void in part as fraudulent against creditors, is void for the whole. But there must be actual fraud; otherwise a grantee will be allowed his actual charges and expenses.(6)(b)

43. Nearly connected with *fraudulent conveyances*, is the subject of the *acknowledgment and registration* of deeds. A deed not legally recorded, like a fraudulent deed, is in general good, and may be used in evidence, between the parties; and is void only as to creditors and subsequent purchasers, deriving title from the same grantor.(7) Indeed the secrecy

(1) *Meseme v. Dyer*, 4 Greenl. 52; *Fox v. Hills*, 1 Conn. 295; *Jackson v. Myers*, 18 John. 425; *Seward v. Jackson*, 8 Cow. 406. See *Waterbury v. Sturtevant*, 18 Wend. 353; 18 Pick. 131; 8 N. H. 35.

(2) *Howe v. Ward*, 4 Greenl. 195.

(3) *Foster v. Hall*, 12 Pick. 89.

(4) *Foster v. Hall*, 12 Pick. 89; *Howe v. Reed*, 3 Fairf. 515. (But see *Blake v. Howard*, 2 Ib. 202.)

(5) *Findley v. Cooper*, 1 Blac. 262; *Man-*

hattan, &c. v. Evertson, 6 Paige, 457; *Kimball v. Eaton*, 8 N. H. 391.

(6) *Wackie v. Cairns*, 5 Cow. 547; *McKee v. Gilchrist*, 3 Watts, 230; *Gardiner, &c. v. Wheaton*, 8 Greenl. 373.

(7) *Doe v. Naylor*, 2 Blackf. 33; *Semple v. Miles*, 2 Scam. 316; *McConnell v. Reed*, Ib. 374; *Odiorne v. Mason*, 9 N. H. 24; *Hopping v. Burnham*, 2 Greene, 391. So a deed, the *acknowledgment* of which is illegal; as if taken by the grantee himself. *Beaman v. Whitney*, 7 Shepl. 413.

(a) So, to an action of trespass for cutting timber on the plaintiff's land, it is no defence, that the defendant acted under a power of attorney from the plaintiff's grantor, who was *non compos*, and that the deed was fraudulent. *Waterhouse v. Maxwell*, S. J. C. Maine, April T. -41; *Law Rep.* July, -41, p. 120. So where, to a suit against the heirs of one deceased, they plead *riens per descent*, it is no answer to such plea, that he made a fraudulent conveyance. *Harrison v. Campbell*, 6 Dana, 267.

If an absolute deed is given in satisfaction of a mortgage, and avoided by creditors as fraudulent, the mortgage is hereby revived. *Irish v. Claves*, 10 Verm. 81.

A title, subsequently acquired by a fraudulent grantor, enures to the benefit of the grantee by virtue of the warranty. *Dunbar v. McFall*, 9 Humph. 505. See *Tremper v. Barton*, 18 Ohio, 418.

(b) Where an administrator procures a conveyance by his intestate, to be set aside in equity, as fraudulent against creditors, and the amount of debts equals that of the property conveyed, the grantee cannot deduct and retain the price which he paid therefor. *Holland v. Craft*, 20 Pick. 321. Nor can it be done by his assignees for the benefit of creditors. Ib. That a conveyance without consideration may be bad as to some parties only, see *Doe v. Rolfe*, 8 Ad. & El. 650.

attending a want of registration is itself a badge of fraud. In all the States, this subject is regulated by express statutes.(a)

44. In Massachusetts, a deed shall be acknowledged by the grantors or one of them, or by the attorney who executes it, before a justice of the peace in the State, or any justice, magistrate or notary public,(b) in the United States or in any foreign country, or before any commissioner appointed therefor by the governor, or any minister or consul of the United States in a foreign country. If a grantor die, or leave the State, without acknowledgment, a subscribing witness may prove the deed before any court of record in the State. If all the witnesses are dead or out of the State, the handwriting of the maker or of any witness may be proved. If a grantor refuses to acknowledge his deed, the grantee, or one claiming under him, may obtain from a justice in the county where the land lies, or where the grantor or any witness lives, a summons to the grantor, to appear and hear the testimony of the subscribing witnesses. The justice shall certify the proof by such witnesses, and the presence or absence of the grantor. If the witnesses are all dead or out of the State, the same application may be made to a court of record, and proof of the handwriting of the grantor and a witness shall be sufficient. Before or during such application to a court or justice, any party interested may file a copy of the deed in the registry, which for thirty days shall have the effect of registration. If at that time proceedings are pending before a justice, seven days more are allowed from their termination. No deed shall be proved before a court or justice, unless it has one witness.(c) No deed shall be recorded, unless the fact of acknowledgment or proof is certified to by the justice or the clerk of the court. Deeds of *peus* may be recorded by the clerk

(a) As to the acknowledgment of deeds in England, more especially in conveyances by married women, see *Mary, &c.*, 1 Mann. & G. 881; *Warburton v. Warburton*, 3, 633; *Shaw*, Ib. 237; *Whitty*, Ib. 201; *Webster to Carline*, 4, 27; *Birch & Bell*, 6 Scott, 185; *Shufflebottom*, Ib. 898; *Mann*, 7 Scott, 142; *Ann, &c.*, 8, 147; *White*, 3 Scott N. 591; *Alice, &c.*, 647. The affidavit of an acknowledgment in Russia, before the British Consul, is sufficient, the Russian laws not authorising an oath before a magistrate. *Davy to Mattwood*, 2, 424. Where an acknowledgment took place in a remote part of India, before certain military officers, the commissioners named being absent; held, the commission should be amended by inserting the names of such officers. *Stubbs v. Oakley*, 4 Mann & G. 609. Acknowledgment is not necessary to the validity of a deed as against the grantor, his heirs and devisees, or other parties having notice. *Call v. Butrick*, 4 Cush. 345. *Wark v. Willard*, 13 N. H. 389. *Dole v. Thurlow*, 12 Met. 151.

But, a deed not acknowledged is not notice, though recorded. *Strong v. Smith*, 3 McLean, 362.

An unregistered deed does not confer a mere equity. It is a legal conveyance, and though it cannot be given in evidence and therefore is not a perfect legal title, it operates as a deed from delivery, and cannot be redelivered to the grantor. Such deed may be set up in equity *Walker v. Coltraine*, 6 Ired. Eq. 79.

So, a deed, though not recorded, is valid against a mere trespasser. *Strickland v. McCormick*, 14 Mis. 166.

The registry acts are remedial, and must therefore be liberally and beneficially construed. *Fort v. Burch*, 6 Barb. 60.

A statute may make good the defective acknowledgment of deeds, and may operate as a rule of evidence, as regards the execution of the instrument. *Moore v. Nelson*, 3 McLean, 383. *Raverty v. Fridge*, 3 McLean, 230.

(b) Where the acknowledgment of a deed is taken and certified by a notary public, his certificate need not be authenticated by his notarial seal. *Farnum v. Buffum*, 4 Cush. 260.

(c) A deed not being acknowledged, and the signer and one of the witnesses being dead, the other testified in court, that he had no distinct recollection of the matter, or of his own handwriting. Held, the signature of the grantor might be proved by other testimony, and the deed admitted to record; and, unless there was fraud, the proceeding could not afterwards be collaterally questioned. *Thomas v. Le Baron*, 8 Met. 355.

of the town, parish, society or proprietors. A conveyance of any freehold estate, or a lease for more than seven years from the making, is void against all but the grantor, his heirs and devisees, and parties having notice,^(a) unless the deed be recorded. The recording of an instrument, which creates or declares a trust, is actual notice of its existence.^{(1)(b)}

45. Acknowledgment by one of two grantors has been held sufficient to authorize the registration of a deed; (and this is now expressly enacted.) Thus a wife, releasing her dower, or even joining in a conveyance of her own land,^(c) need not acknowledge the deed. This is upon the ground, that the acknowledgment of one grantor justifies the recording of the deed *as his*; and this gives the requisite notoriety *to the whole instrument*. Nor is it material, whether the grantors are tenants in common or owners in severalty.⁽²⁾

46. A former statute, like the present, required acknowledgment before a justice of the peace or *magistrate*, out of the State. Held, an American consul at a foreign port was a *magistrate*.⁽³⁾

47. A deed was acknowledged before the register, and handed to him to be recorded. At the same instant, a creditor of the grantor attached the land. Held, as a certificate of acknowledgment was necessary to registration, the attachment should prevail.⁽⁴⁾

48. In this State it has been held, (and this is the general doctrine on the subject,) that registration is designed as a substitute for *livery of seizin*; and that if *the notoriety*, intended to be effected by both of these ceremonies, is otherwise attained, registration is unnecessary.^(d) Upon this ground, not only is an unrecorded deed good against the grantor and his heirs, but also against a second purchaser or attaching creditor, having actual or presumptive notice of the former conveyance; for such

(1) Mass. Rev. St. 406-8; St. 1844, 289.

(2) *Pidge v. Tyler*, 4 Mass. 541; *Catlin v. Ware*, 9, 218; *Dudley v. Sumner*, 5, 438; *Shaw v. Poor*, 6 Pick. 86.

(3) *Scanlan v. Wright*, 13 Pick. 523.

(4) *Sigourney v. Larned*, 10 Pick. 72.

(a) Held, not to mean positive and certain knowledge, but only such notice as is usually the ground of action in ordinary affairs. *Curtis v. Mundy*, 3 Met. 405.

(b) Registration does not operate as constructive notice, unless the instrument is one which the law requires to be recorded, nor unless the formalities are observed, which are prescribed as preliminary to registration. Thus, the recording of an unacknowledged deed has no legal effect. *Blood v. Blood*, 23 Pick. 80; acc. *De Witt v. Moulton*, 5 Shepl. 418; *Dunn v. Gaines*, 1 McL. 520.

(c) This is carrying the point to a very great length. *Sedgwick, J.*, dissented.

(d) The same principle applies, in England, in case of a prior judgment not *docketed*, but of which the subsequent purchaser has notice. *Tunstall v. Trappes*, 3 Sim. 286. But see *Davis v. Strathmore*, 16 Ves. 419. Whether an unregistered mortgage has preference of a subsequent docketed judgment, see 4 Kent, 172; *Schmidt v. Hoyt*, 1 Edw. 652; *Ledyard v. Butler*, 9 Paige, 132; *Ash v. Ash*, 1 Bay, 304; *Jacques v. Weeks*, 7 Watts, 261; *Davidson v. Cogan*, 1 Badg. & Dev. Equ. 470; *Bank, &c. v. Sturges*, 2 McLean, 341. In North Carolina, where a deed of trust is made to A, but not recorded, and B, having notice, takes another; this is no fraud on the part of B, certainly at law, or as against parties not claiming under A. *Burgin v. Burgin*, 1 Ired. 453. In Kentucky, an unrecorded deed is invalid *at law* against creditors, though they have notice of it. *Edwards v. Brinker*, 9 Dana, 69. Where a second mortgagee, having no notice of the first mortgage when he takes the second, memorializes the second after receiving notice; he will have priority, if the memorial of the former is defective. *Essex v. Baugh*, 1 Y. & Coll. Cha. 620. If two deeds, of different dates and times of acknowledgment, are recorded on one day, parol evidence is not admissible as to priority of reception by the register. Nor is the order in which they are entered any evidence. But the first deed prevails over the other, unless the latter be proved to have been first recorded. *Hatch v. Haskins*, 5 Shepl. 391.

purchaser or creditor is himself guilty of a fraudulent act.^(a) And the same rule applies to a purchaser with notice from such fraudulent grantee. A second purchaser or creditor, however, having notice, will acquire a good title against the first purchaser, after waiting a reasonable time for the first purchaser to record his deed; because he may fairly presume that in some way the estate has been restored to the grantor. Seven days has been held not a reasonable time. But, where there is *no notice* of the first deed, this is postponed to an attachment or subsequent conveyance, without allowing the first grantee any time to record his deed,^(b) even though there is notice of an intention to make a deed. Where there are two conveyances, the one fraudulent and void as to the other, and the fraudulent one is first recorded, this grantee may pass a good title to one not having actual notice of the deed which is not fraudulent, though registered before such conveyance by the fraudulent grantee.^(c) The fraud or notice of a second purchaser must be clearly proved. But his having read the former deed will charge him with notice of all its contents. Open, peaceable and exclusive possession, by the grantee, is not conclusive of notice. Thus, where one owning and occupying part of a lot, which was not divided by a fence, purchased the rest, chiefly woodland, and then repaired the fence of the lot, pastured cattle upon it, and sold trees from the part purchased; this was held not to be sufficient notice. But possession is notice, though there was no visible change thereof at the making of the deed, unless the second purchaser knew that the first was in possession prior to the deed, not claiming title. In case of a deed and defeasance back, notice to a creditor, &c., in order to have any effect, must be notice of such facts as constitute the transaction a mortgage. The grantor's remaining in possession is not sufficient notice of such bond to creditors of the grantee.^{(1)(d)}

(1) *Dudley v. Sumner*, 5 Mass. 438; 6, 487; *Wells v. Prince*, 4, 68; 3, 573; *Norcross v. Widgery*, 2, 506; *Farnsworth v. Childs*, 4, 637; 6, 24; *Prescott v. Heard*, 10, 60; *State, &c. v. Bradish*, 14, 296; 1 Pick. 164; *Brown v. President, &c.*, 11 Mass. 163; *Trull v. Bigelow*, 16, 406; *M'Mechan v. Griffing*, 3 Pick. 149; *Cushing v. Hurd*, 4, 253; *Newhall v. Burt*, 7, 157; *Newhall v. Pierce*, 5, 450; *Adams v. Cuddy*, 13, 460; *Hewes v. Wiswell*, 8 Greenl. 94; *Brackett v. Wail*, 6 Verm. 411; *Rogers v. Jones*, 8 N. H. 264; *Jaques v. Weeks*, 7 Watts, 261; *Hudson v. Warner*, 2

Harr. & G. 415; *Matthews v. Demeritt*, 9 Shepl. 312; *Forrest v. Warrington*, 2 Des. 254; *Roads v. Symmes*, 1 Ham. 281; *Newman v. Chapman*, 2 Rand. 93; *Jackson v. Burcott*, 10 John. 457; *Pike v. Armstead*, 1 Badg. & Dev. Equ. 110; *Chiles v. Conley*, 2 Dana, 23; *U. S. v. Canal, &c.*, U. S. Cir. Ct. May, 1844, *Maine Law Rep.* June, 1844, p. 88; *Griswold v. Smith*, 10 Verm. 452; *Lightner v. Mooney*, 10 Watts, 412; *Miller v. Cresson*, 5 Watts & S. 284; *McCulloch v. Cowker*, Ib. 427; *Boggs v. Varner*, 6, 469; *Hardy v. Summers*, 10 Gill & J. 317; *Flynt v. Arnold*, 2

(a) But, if a creditor of such second purchaser attach the land, having no notice of the prior conveyance, his title will be good, although he receive notice before levying his execution, and although the attachment was not recorded according to law. The exception in the statute in regard to the validity of unrecorded conveyances, where the second purchaser has notice, is strictly personal. It does not apply to a purchaser from him; and an attachment is in the nature of a purchase. The omission to record the attachment, could have an effect only in relation to subsequent purchasers or attaching creditors. *Suffolk, S. J. C. March, 1840; Coffin v. Ray*, *Law Reporter*, Aug. -40, 141; *U. S. v. Canal &c.*, 2 Story R. 79.

(b) The English statute of enrolments allows six months for this purpose, and the enrolment relates to the making. So in some other States. (*Infra.*)

(c) Notice to a husband is not such to the wife, where a deed is made to them jointly of land subject to a prior unregistered mortgage; especially if the whole consideration proceeds from her. *Snyder v. Sponable*, 1 Hill, 567.

(d) A mortgagee, who took his mortgage with notice of a prior unregistered deed to B, assigned the mortgage to C, who had not such notice, to secure a pre-existing debt and a sum

49. If a mortgagee assign the mortgage, and afterwards take a deed from the mortgagor, and the assignment be not recorded, the assignment is invalid against creditors of the mortgagee, who may attach the land as his.(1)

50. A deed given by a tax collector must be acknowledged and recorded to pass a perfect title.(2)

51. As between parties claiming under different grantors, priority of registry has no legal effect. Registry is constructive notice only as between purchasers from one grantor.(3)

52. A, claiming under an ancient deed not recorded, had been out of possession more than forty years, and the land had been used as a road. The road being discontinued, B purchased the land from C, having no notice of the deed to A. A's deed was afterwards recorded. Held, A's title should prevail.(4)

53. The certificate of the register of deeds is conclusive, as between the grantee and a creditor, as to the time of recording the deed.(5)(a)

54. In Maine, any deed of lands, except a lease for less than seven years, is acknowledged before a justice of peace in the State, a justice, magistrate, notary or commissioner, in any other of the United States, or United States minister or consul abroad; and thereupon recorded. Otherwise, it is valid only against the party and his heirs. If the grantor go beyond sea or out of the government, or die, before acknowledgment, the deed may be *proved* by a subscribing witness before a court of record in the State, or, if one or all the witnesses are dead, by the testimony of two witnesses to the handwriting of the grantor and the witnesses, before a court of record. Upon refusal to acknowledge the deed, a copy left at the registry shall be effectual for forty days; and the grantor may be summoned, as in Massachusetts, for the purpose of proof by the subscribing witnesses. Delivery of a deed to the register is in law a recording of it.(6)

55. It is held in this State, that where a deed is not recorded, in order to charge a second purchaser, &c., with notice, the facts must be such as to leave no reasonable doubt. Knowledge on the part of the attorney of a creditor who brings the action, will not charge the latter. So

Met. 619; Neale v. Hagthorpe, 3 Bland, 586; Dixon v. Lacoste, 1 Sm. & M. 70; Rogers v. Jones, 8 N. H. 264; Frothingham v. Stacker, 11 Mis. 77; Meuse v. McLean, 13, 298; Bush v. Golden, 17 Conn. 594; Sponable v. Snyder, 7 Hill, 427; Moyer v. Schick, 3 Barr, 242; Randall v. Silverthorn, 4 Barr, 173; Brown v. Bank &c., 3, 187; Landes v. Brant, 10 How. 348.

(1) Clark v. Jenkins, 5 Pick. 280.
(2) Tilton v. Thompson, 10 Pick. 359.
(3) Tyler v. Hammond, 11 Pick. 193.
(4) Ib.
(5) Tracy v. Jenks, 15 Pick. 465.
(6) 1 Smith, 138-142; Rev. St. 78, 373, 586.

of money advanced at the time, the amount of the mortgage exceeding the aggregate of both these sums. Held, he had a valid title against B to the amount of his whole claim. Glidden v. Hunt, 24 Pick. 221.

By virtue of an agreement between A and D, who had notice of B's deed, D paid to C his entire claim, and to A the balance of the mortgage debt, and took an assignment of the mortgage from C. Held, B might redeem on paying the amount paid by D to C, with interest. Ib.

(a) Action against a tenant in dower by an assignee of the reversion, for waste committed by her assignee. Held, the actual possession of the latter was sufficient evidence of the assignment to him, though the assignment was not recorded till after the commencement of the suit. Foot v. Dickinson, 2 Met. 611.

notice to the officer who serves the process is insufficient, though communicated to the creditor before extent of his execution, but after attachment of the land. But, if the party have notice, the manner in which he obtains it is immaterial.(1)

56. Conveyance from A to B. A at the same time takes back a deed to himself and his two sons. The former deed was recorded, but not the latter, but A remained in possession. Held, such possession was so far notice of the deed to A, that a creditor of B could not hold the land.(2)

57. But possession is only *implied* notice, which does not charge a party actually ignorant of the fact.

58. A conveyed to B, and B entered, but the deed was not recorded. B conveyed to C, who suffered the land to remain vacant. D fraudulently induced B to surrender his deed to A, and himself took a deed from A, which was recorded; entered, and occupied till his death; and his administrator then conveyed to E, who was ignorant of D's fraud and of the deed from A to B. In an action by C against E, held, B's possession was only implied notice of his title, and that E, having no actual notice, should hold against C.(3)(a)

59. In New Hampshire, deeds, except leases for more than seven years, are acknowledged before a justice of the peace, notary public, or commissioner, or a minister or consul of the United States abroad, and recorded; otherwise, they are valid only against the grantor and his heirs. So, also, powers of attorney to convey. Upon refusal to acknowledge, the grantee may record the deed, which shall be effectual for sixty days; and a grantor may be summoned by a justice of the peace to attend a proof by the witnesses, (as in Massachusetts and Maine.) If the grantor is beyond sea, or remove from the State, or be dead, or insane, before acknowledgment, the execution may be proved by a witness before a court of record; if the witnesses are dead, or be-

(1) *Lawrence v. Tucker*, 7 Greenl. 195.
(See *Wise v. Tripp*, 1 Shepl. 9; *Stanley v. Perley*, 5 Greenl. 369; *Porter v. Cole*, 4 Greenl. 20.

(2) *Webster v. Maddox*, 6 Greenl. 256.
(3) *Hewes v. Wiswell*, 8 Greenl. 94.

(a) Acknowledgment before the grantee himself is void; leaving the deed good, however, between the parties. *Beamau v. Whitney*, 7 Shepl. 413. Where an acknowledgment specifies no date or place, the former is presumed to be that of the deed, and the latter to be within the justice's jurisdiction. *Rackieff v. Norton*, 1 Appl. 274.

Under Rev. Sts. ch. 91, sec. 26, implied or constructive notice of a prior, unrecorded deed, will not avoid a subsequent one; actual notice is necessary. *Spofford v. Weston*, 29 Maine, 140; *Hanly v. Morse*, 32 Maine, 287.

It seems, that the conduct of a subsequent purchaser or attaching creditor, who has knowledge or notice of a prior conveyance, and afterwards attempts to acquire a title to himself, is fraudulent. *Spofford v. Weston*, 29 Maine, 140.

The knowledge on the part of the grantee in the subsequent deed, that there are upon record conveyances, the title being in dispute, made by parties who cannot show by the registry any title in themselves, derived from the former actual owner, no conveyance from him appearing therein; and information derived by the grantee from persons obtaining their knowledge from such registry; is not such actual notice of a prior unregistered deed as will defeat his title. *Ib.*

It is not the duty of a party purchasing land, to inquire of a person claiming under a prior unregistered deed, as to his title. *Ib.*

Where the declarations of the subsequent purchaser show both his disbelief of any prior deed, and his knowledge of the claim of the parties professing to hold under such a deed, they do not warrant the conclusion, that he had actual notice of the existence of the deed; nor is his conduct fraudulent, in taking a conveyance to himself. *Ib.*

yond sea, or removed out of the State, or cannot be had, and the grantor is also dead, his handwriting and that of the witnesses may be shown by two witnesses—the proof, in these cases, to be before the Superior Court or Court of Common Pleas; or a justice of the peace and of the *quorum*, and a clerk of one of said courts; and provided the grantee took possession, living the grantor, and he, or some one claiming under him, has ever since continued in quiet possession. Powers of attorney to convey lands, being acknowledged and recorded, are placed on the same footing with deeds, as to the reception of copies in evidence. Any one interested in a deed may, by warrant from a justice of the peace, require the party having possession of it, to put in on record.(1)

60. Although, where an owner conveys land, and the grantee neglects to record his deed, the grantor may validly convey anew to an ignorant third person; yet one having no evidence or pretence of title cannot pass a good title to another, merely because the true owner has neglected to record his deed. A stranger to the title cannot, any more than the grantor himself, object to the want of acknowledgment and registration. The statute of enrolments was designed for the protection of creditors and subsequent purchasers, not of wrong-doers.(2)

61. A deed may be validly acknowledged before a notary public in another State. Being a mere ministerial act, a justice of the peace may take such acknowledgment out of his own county.(3)

62. A deed or power of attorney must be acknowledged or proved according to law, in order to authorize its registration, and to render admissible in evidence an office copy of such deed.(4)

63. The prevailing language of the statutes upon this subject is, that an unrecorded deed is good against the grantor, his heirs and devisees. In New Hampshire, the language is, *against heirs*. In a recent case, the rights and powers of a devisee, in this respect, were brought in question.

64. A conveyed to B. The deed was not recorded, and A occupied till his death, and devised to C. C entered after A's death, and conveyed to D, who had notice of the deed to B. Held, the land passed by the will, and D should hold against B and his assigns.(5)

65. Where a person takes a conveyance from one man, of land of which another has open and visible possession, the purchaser is presumed to know everything in relation to the title of the possessor, which could have been learned by the most diligent inquiry; not because the possession is itself calculated to give such knowledge, but because such purchases ought not to be encouraged, nor the grantee to stand on any better footing than the grantor.(6)

65 a. A party took a conveyance of land in trust, to sell and account for it to his grantor, but gave his note for the consideration, which note was afterwards sued by such grantor, and the land set off to him in

(1) 3 Griff. 35-7; *Southerin v. Mendum*, 5 N. H. 427-8; N. H. L. 533-4; Rev. St. 67, 243-4. See *Brown v. Edson*, 23 Verm. 435.

(2) *Olmstead v. Niles*, 7 N. H. 527; *Tyler v. Hammond*, 11 Pick. 193; *Montgomery v. Dorion*, 6 N. H. 250; *Odiorne v. Mason*, 9 N. H. 24.

(3) *Southerin v. Mendum*, 5 N. H. 420; *Odiorne v. Mason*, 9 N. H. 24.

(4) *Montgomery v. Dorion*, 6 N. H. 250.

(5) *Whittemore v. Bean*, 6 N. H. 47.

(6) *Hadduck v. Wilmarth*, 5 N. H. 187-8-9; *Colby v. Kenniston*, 4 Ib. 262; *Tomson v. Ward*, 1 Ib. 11. See *Rogers v. Jones*, 8, 264; *Great Falls, &c. v. Worster*, 15 N. H. 412.

satisfaction of the judgment and execution. Held, where such deed was recorded, (though not acknowledged,) and no actual knowledge of the same brought home to a creditor of the grantor, if he were to be charged in any way with constructive notice, it must be constructive notice of the trust as well as the deed.(1)

65 *b*. Whether a creditor who had actual notice of such a deed, but no knowledge of the trusts, might not, in the case above stated, have attached and levied on the estate so conveyed, in satisfaction of a debt of the grantee, *quære*?(2)

66. In Vermont, a deed for more than one year is acknowledged before a justice of the peace, or the judge of some court of law, and recorded in the town clerk's office, or for want thereof in the county clerk's office, where the land lies. A *feme covert* is privately examined. If a grantor is out of the State, or dead, the deed may be proved by an attesting witness, before any judge of the Supreme or County Court. If the grantor and all the witnesses are dead, or out of the State, the proof may be before the Supreme or County Court, by proving the handwriting of the grantor, or witnesses, or other evidence. In case of refusal to acknowledge, the grantee may record as in New Hampshire, and have compulsory process from a justice of the peace. In such case, registration will be effectual for sixty days. If the proceedings are not then terminated, for six days after they are closed. Powers of attorney are authorized to be recorded. Acknowledgment or proof out of the State may conform to the law of the place where it is made. It may take place before a magistrate, justice of the peace, notary or commissioner, or, if abroad, before a minister, charge or consul. A process is provided, for compelling a grantor to record his title deeds.(3)(a)

67. Where a deed is *proved* as a substitute for acknowledgment, the certificate of the magistrate need not show a refusal to acknowledge, but only the fact of proof, and the presence or absence of the grantor; and, in case of absence, that he was duly summoned.(4)

68. The certificate of proof remains effectual, though the grantor appeal from the justice. Hence, no certificate is necessary from the clerk of the court to which the appeal is made. It seems, the appeal applies only to *costs*.(5)

69. Acknowledgment before "A B, judge of the Supreme Court," is good; because the constitution makes a judge of the court *ex officio* a justice of the peace.(6)

70. But, where a deed is *proved* before a *judge*, the certificate must state the facts which take the case out of the general rule, requiring acknowledgment before a magistrate.(7)

71. The registration of an acknowledged deed has no effect, as constituting implied notice of such deed, beyond the temporary effect expressly given to it by the statute.(8)

(1) Dow *v.* Sayward, 14 N. H. 9.

(2) *Ib.*

(3) Verm. Rev. St. 313-4.

(4) Caltin *v.* Washburn, 3 Verm. 25.

(5) *Ib.*

(6) Middlebury, &c. *v.* Cheney, 1 Verm. 350.

(7) Pearl *v.* Howard, 1 D. Chip. 173.

(8) Hoisington *v.* Hoisington, 2 Aik. 235.

(a) By act of 1850, (p. 36,) a town clerk, notary, or master in Chancery, may take acknowledgments of deeds.

72. A certificate of acknowledgment need not show in what State it was taken, provided this appears with reasonable certainty from inspection of the whole instrument.(1)

73. An acknowledgment is valid, though not dated.(2)

74. A deed, made before any statute requiring acknowledgment and registration, is sufficiently proved by long acquiescence in it as a valid deed.(3)

75. A conveyed to B, and at the same time gave him an acknowledgment upon a copy of the deed, that he had received the original for the purpose of registration. A neglected to record the deed, but the copy, with the receipt upon it, was recorded. Held, this registration was not effectual as against a creditor of A, who levied upon the land.(4)

76. Open, exclusive, and continued possession and improvement of land constitute sufficient notice of title, though a deed, under which the possessor claims, has been recently executed, in fulfilment of a contract of purchase, under which possession was first taken, and has not been recorded. But the possession of the grantee, jointly with the grantor, and in continuation of the grantee's prior residence, is not sufficient notice.(5)

77. A conveys to B, whose deed is not recorded. B conveys to C, and D, having notice of such conveyance, fraudulently procures from B his deed, returns it to A, himself takes a deed from A, and conveys to E, who had no notice of the prior conveyances. Held, E's title should prevail over C's, and over that of a grantee of C, having notice, both in law and equity.(6)

78. Where a second deed is made to *partners*, notice to one of them of a prior deed binds the whole.(7)

79. Where a father takes a conveyance to his minor son, but retains the deed himself, without recording it, the son has no claim to the deed or the lands.(8)

80. Registration of a deed is not presumed. Hence parol evidence of its contents is admissible, without proving that the party has searched the record.(9)

81. Where a second grantee has notice of a prior unrecorded deed, its execution, contents and existence, he is not protected from the effect of such notice, by any erroneous opinion as to its validity.(10)

81 *a*. Although the name of the grantor is defectively stated in the certificate of acknowledgment; yet, it is sufficient, if it appear with reasonable certainty from the whole instrument, that the deed was acknowledged by the grantor.(11)

82. In Connecticut, a deed is not evidence of title, without a certificate of acknowledgment, even between the parties; but as between them, recording is unnecessary. If the grantor refuses to acknowledge, the grantee may enter *caution* with the town clerk, which will secure his claim till a trial is had; and then a copy of the judgment of court, recorded in the town registry, will establish his title. Deeds are re-

(1) Brooks *v.* Chaplin, 3 Verm. 281.

(2) Galusha *v.* Sinclear, 3 Verm. 394.

(3) Stevens *v.* Griffith, 3 Verm. 448.

(4) Stevens *v.* Brown, 3 Verm. 42.

(5) Rublee *v.* Mead, 2 Verm. 544; Hoisington *v.* Hoisington, 2 Aik. 235.

(6) Morrison *v.* Shattuck, 1 D. Chip. 42.

(7) Barney *v.* Jewett, 1 D. Chip. 315.

(8) Ward *v.* Morril, 1 D. Chip. 322.

(9) Mattocks *v.* Stearns, 9 Verm. 326.

(10) Brackett *v.* Wait, 5 Verm. 424.

(11) Chandler *v.* Spear, 22 Verm. 388.

corded in the office of the town clerk, where the land lies. Otherwise, they are good only against the grantor and his heirs. *Reasonable time* is allowed for recording. Acknowledgment is made by the grantor or his attorney. The power of attorney is acknowledged and recorded. Acknowledgment is made before a justice of the peace, a United States' judge, or a judge of the Supreme or Superior Court, or the Court of Common Pleas, or the County Court of any State, or commissioner of the school fund, or notary public, or before an officer commissioned for this purpose. Past deeds are made valid, if thus authenticated. Leases for more than one year are good only between the parties, unless acknowledged before a justice of the peace, or school-commissioner, and recorded. Deeds made abroad may be acknowledged before a consul, notary public, or justice of the peace; if in another State, acknowledged or proved before a commissioner appointed by the governor. By a late act, acknowledgments certified by a notary without a seal are made valid.

83. The registry of a deed is of no validity, if such deed is defective through the want of some statutory requisites, whether the defect appear upon the face of the instrument or not; as, for instance, where one of the attesting witnesses is the wife of the grantor.(1)

84. A, on the same day, made separate mortgages of the same land to B and C. B's deed was entered for record a short time before C's, but on the same day. B, being in possession under his deed, acknowledged in writing that the two deeds were concurrent, and that his deed was first recorded through mistake. B afterwards conveyed to D. Held, such writing, though not recorded, was admissible evidence against D.(2)

85. If a prior deed fails to be recorded, through some act of the second grantee, the latter shall not hold the land.(3)

86. It has been held, that one cannot recover, even against a stranger in ejectment, under an unrecorded deed. (But four out of nine judges dissented, and the decision has been often questioned.)(4)

87. Where a deed is received for record, this entry made upon it by the register, and the deed lodged in the office, the effect is the same as that of actual registration.(5)

88. It is said, that an execution creditor, with knowledge of an unrecorded deed, will be postponed. But the question seems to be unsettled. A second grantee will not be postponed by reason of the former deed, unless guilty of fraud.(6)

89. A deed is no evidence of title, without a proper certificate of acknowledgment.(7) (See sec. 82.)

90. A certificate in this form, "personally appeared A B, signer of the above instrument, to be his free act and deed," &c., is no evidence of an acknowledgment, and cannot be supplied by any construction or intendment.(8)

(1) 3 Griff. 63-6; Conn. St. 349-50-2-3; 1842, 38; Sumner v. Rhoades, 14 Conn. 135. See also St., 472-3, as to *School Fund*.

(2) Beers v. Hawley, 2 Conn. 467; (Beers v. Broome, 4, 248.)

(3) St. Andrews v. Lockwood, 2 Root, 239.

(4) French v. Gray, 2 Conn. 92; Dutt. 89.

(5) McDonald v. Leach, Kirby, 72.

(6) 1 Swift, 126; Hinman v. Hinman, 4 Conn. 577; Wheaton v. Dyer, 15 Conn. 307.

(7) Stanton v. Button, 2 Conn. 527.

(8) Ib.

91. The certificate of the justice, who takes the acknowledgment of the deed, may be proved false.(1)

92. Acknowledgment must appear upon the deed itself, and cannot be proved by parol evidence.(2)

93. Before a grantor can effectually *enter caution*, he must require the grantor, and the latter must have refused, to acknowledge the deed. After such entry, the deed is admissible in evidence.(3)

94. In Rhode Island, acknowledgment and registration are unnecessary, as between the parties and their heirs. Deeds for more than one year are recorded in the office of the town clerk where the land lies, and take effect in the order of their registration, except that five days are allowed for recording a *defeasance*. A wife, releasing dower, need not acknowledge the deed ; but, to a conveyance of her own land, an acknowledgment and private examination are necessary. Acknowledgment is made before any senator, judge, justice of the peace, or town clerk. Where a grantor, on request, refuses to acknowledge, upon complaint made by the grantee, his heirs or assigns, any *judge, justice, or warden* in the town where the grantor resides may issue a *warrant* against him, and imprison him without bail, if he persists in refusing, subject to an appeal. Pending such appeal, a copy of the deed, filed with the town clerk, is a sufficient protection. Where a grantor dies, or leaves the State, before acknowledgment, the deed may be proved by two of the witnesses before the Supreme Court, or Court of Common Pleas. If the grantor resides in another State, or country, the deed is acknowledged before a commissioner, judge, justice, mayor, or notary public therein, and certified under his hand and seal. If abroad, before a vice-consul, charge, or commercial agent, of the United States. If an ambassador, &c., is party to a deed, it may be executed before two witnesses, and certified by himself under his seal. An instrument of defeasance is invalid against a *bona fide* purchaser.(4) .

94 a. An administrator, duly licensed to sell real estate, conveyed a certain farm. One of the children of the intestate conveyed to his son all his right and title in the premises, being one-fifth part, and subsequently the said fifth part was duly attached and sold on execution by the sheriff, by a deed duly executed. The deed given by the administrator was not recorded, until a considerable time from the record of the deed made by the sheriff. Held, by the registry tact of Rhode Island, the deed given by the administrator, at the time the purchaser's right accrued under the sheriff's deed, was void ; although so long as the purchaser from the administrator, or those claiming under him, claim against the heirs of the intestate, the deed, though unrecorded, would by the terms of the act be valid and binding. Except between the parties and their heirs, a deed not recorded, and without notice, is void both by the words and the intent of the act, however the title accrued.(5)

94 b. An open and continued possession of land, by a person having an unrecorded deed, and claiming the land as his own, is not presumptive notice of the existence of such a deed, to a subsequent purchaser.

(1) *Smith v. Ward*, 2 Root, 374.

(2) *Pendleton v. Button*, 3 Conn. 406.

(3) *Bond v. Kibbe*, 3 Day, 500.

(4) 3 Griff. 96-100 ; R. I. St. 1841, 2033 ;

1842, 2068, 2076. See *Anthony v. Butler*, 13 Pet. 423.

(5) *Harris v. Arnold*, 1 R. I. 126.

If a deed could be presumed from possession, it would not be necessary to record it. Possession, though evidence of some title, is not necessarily evidence of any particular title, but should put the party on inquiry; and the intent of the registry act is to protect purchasers from secret conveyances, by requiring registration on peril of forfeiting the estate. The record of the will of a person, who has had possession under an unrecorded deed, does not bind a subsequent purchaser.(1)

95. In New Jersey, deeds are acknowledged, or proved by a subscribing witness, before the Chancellor, a justice of the Supreme Court, master in Chancery, judge of any Court of Common Pleas, or a commissioner appointed for the purpose, whose power extends through the State; and a certificate, signed by such officer, is made upon or under the deed. A deed, thus authenticated, is made admissible in evidence. And no deed shall be recorded without such authentication. If a party, or the witnesses, live in any other State or Territory of the United States, the acknowledgment or proof may be made before a judge of the Supreme or District Court of the United States, a judge or justice of the Supreme or Superior Court, or Court of Common Pleas, of any State or Territory, or the chief magistrate of any city, certified under the seal thereof. If before a judge of the Court of Common Pleas, a certificate, under the great seal of the State, or the seal of the court of the county, that the party is such judge, shall be annexed to and recorded with the deed. Where either party to an instrument resides in another State, it may also be acknowledged or proved before a commissioner regularly appointed there for this purpose. If the party, or witnesses, live in a foreign kingdom, &c., the acknowledgment, &c., may be before any court of law, or the chief magistrate of any city, borough or corporation therein, with a certificate in the form usually practised there. Both the two last provisions are applicable to *femes covert*. A *feme covert*, not under twenty-one, may execute a deed; she shall be privately examined, and must acknowledge that it is done freely, and without fear or compulsion of the husband, which shall be stated in the certificate. If the grantor or witnesses are dead, or cannot be obtained, the officer may take the examination of a witness under oath or affirmation, to prove the handwriting of the deceased witness or witnesses, or, if this proof cannot be had, of the grantor or grantors. There shall be a certificate of such proof, on or under the deed, and signed by the officer. A deed may be recorded in the office of the Secretary of State, or the clerk of the Court of Common Pleas, in the county where the land lies.(a) And the record, or a certified transcript thereof, shall be as good evidence as the original deed.(2)

96. Where a deed is *proved* before an officer, it ought to appear on the deed, or under the oath of the witnesses, in the certificate, that the person proving the deed is a subscribing witness. The mere statement of the officer to that effect is insufficient.(3)

97. The record of a deed, purporting to be proved before a master in

(1) *Ib.*

(2) 1 N. J. Rev. C. 458-9-60-1, 747-8.

[See N. J. St. 1838-9, 143; 1840, 73; 1845, 36, 244.

(3) *Den v. Gustin*, 7 Halst. 42.

(a) It is subsequently provided, that deeds made after January 1, 1821, shall be lodged for record with the latter officer only, within fifteen days.

Chancery, *by A*, whose name does not appear as an instrumental or attesting witness, is not admissible.(1)

98. A certificate of acknowledgment need not state, in the words of the statute, that the parties acknowledged "that they signed, sealed and delivered the same," &c. It is sufficient that they acknowledge the instrument "to be their act and deed, for the uses and purposes therein mentioned."(2)

99. A deed, acknowledged before one of the associate judges of the Court of Common Pleas of the city and county of Philadelphia, is not evidence. under the act of June 7, 1790.(3)

100. By acts of June 7, 1799, and November 26, 1801, a deed which is duly acknowledged or proved, takes effect as between the parties and their heirs, though not recorded.

101. A deed recorded within six months prevails over a subsequent deed to a *bona fide* purchaser, though the latter is first recorded within that time.

102. A deed may be recorded after six months. But in such case it is postponed to a subsequent *bona fide* deed, if the latter is left for registry before the former. And *vice versa* where the former deed is first left.(4)

103. In New York, a deed, which appears by any other instrument to be intended for security, is a mortgage; and, unless the grantee record such instrument with the deed, he shall not avail himself of the registration of such deed. To authorize registration, a deed shall be acknowledged, or proved by a subscribing witness, before the Chancellor, a justice of the Supreme Court, circuit judge, Supreme Court commissioner, judge of the County Court, mayor, or recorder of a city, or commissioner of deeds; a county judge, or commissioner of deeds for a county or city, not to act out of the same.(a) If in another State, the acknowledgment, &c., is made before a United States' judge, or justice of the Supreme, Superior, or Circuit Court of any State or Territory in the United States, within his own jurisdiction; or before commissioners specially appointed, or the mayor of any city. If the party is in Europe or America, before a resident minister or *charge des affaires* of the United States. If in France, before the United States' consul at Paris; if in Russia, before the same officer at St. Petersburg. If in the British dominions, before the mayor of London, the chief magistrate of Dublin, Edinburgh or Liverpool, or the United States' consul at London. The certificate to be under the hand and official seal of such officer. An acknowledgment, &c., out of the United States, may also be made before any person specially authorized by the Court of Chancery of this State. The officer must be satisfied of the identity of the party.(b) A *feme covert* shall be privately examined; but, if out of the State, this is unnecessary. The proof of a deed must be by a subscribing witness, who shall state his own residence, and that

(1) 7 Halst. 42.

(2) Den v. Hamilton, 7 Halst. 109.

(3) Wells v. Wright, 7 Halst. 131.

(4) Den v. Richman, 1 Green, 44.

(a) A Vice-Chancellor cannot take such acknowledgment. Ridaback v. Levy, 8 Paige, 197. By a late act, justices of the peace are substituted for commissioners. St. 1840, 187.

(b) It is sufficient, if the certificate state a knowledge of the party who *executes* the deed. Thurman v. Cameron, 24 Wend. 87.

he knows the grantor. The officer must be satisfied of the identity of such witness.(a) A witness, refusing to appear and testify to the execution of the deed, may be subpoenaed by any of the above officers, except a commissioner of deeds, within his county; and, if he still refuses, is liable to a pecuniary penalty, and to imprisonment.(b) A certificate of acknowledgment, &c., is indorsed upon the deed, stating the facts, the names and residence of the witnesses, and the substance of their testimony. A deed authenticated as above is admissible in evidence without further proof, and entitled to registration. So the record or a transcript thereof is good evidence. But both this and the certificate of acknowledgment, &c., may be rebutted by other proof.(c) If it appear that the proof was by an incompetent witness, the deed is not admissible till otherwise authenticated. Where the officer is a judge of the County Court, not of the degree of a counsellor in the Supreme Court, or a city or county commissioner of deeds, the deed is not evidence, nor entitled to registry out of such county, unless his authority to act, and his handwriting, be certified under the hand and seal of the clerk of his county, (excepting any deed by the agent of the Holland Land Company, or of the Pulteny estate.) The certificates above mentioned shall be recorded with the deed. All deeds made by the Treasurer of Connecticut, subsequent to March 10, 1825, may be acknowledged before the Secretary of State of that State, and certified under his seal. Past conveyances may be acknowledged, &c., and recorded as above, under the above provisions. A deed is recorded from the time of delivery to the clerk. Where the subscribing witnesses are dead, a deed may be proved before any of the above officers, except commissioners of deeds and county judges, not counsellors in the Supreme Court, by evidence of such death, and of the handwriting of the witnesses, or any one of them, and of the grantor; these facts to appear in the certificate. In such case the deed may be recorded, upon deposit of the original in the office, there to remain for inspection. The registration is notice to all subsequent purchasers, but such deed is not admissible in evidence. The term *purchaser* in the above provisions embraces every grantee for valuable consideration, and every assignee of a mortgage, lease or other conditional estate. The term *conveyance* embraces all instruments affecting lands in law or equity, except wills, leases for not more than three years, executory contracts, and powers of attorney. But, if the two last be acknowledged, &c., and recorded, they are received in evidence like deeds, and cannot be revoked without recording the revocation in the same office. The recording of the assignment of a mortgage is not notice to the mortgagor, so as to avoid any payment to the assignor. The above provisions do not apply to leases for life or years, in the counties of Albany, Sullivan, Herkimer, Dutchess, Columbia, Delaware, and Schenectady.(1)(d)

(1) 1 N. Y. Rev. St. 756-63; St. 1840, 235; 1845, 89.

(a) His certificate must distinctly state the identity, not merely that the name is the same. *Gillet v. Stanley*, 1 Hill, 121.

(b) It may be on any part of the deed. *Thurman v. Cameron*, 24 Wend. 87.

(c) *Acc. Thurman v. Cameron*, 24 Wend. 87. The certificate proves itself.

(d) By an act of 1835, (p. 315,) a wife, out of the State, may join her husband in a power of attorney to convey, which shall be acknowledged, &c., like a conveyance.

A statute of 1848, (p. 353,) authorizes acknowledgment of deeds to be taken out of the State, by persons so authorized in the State in which the acknowledgment shall be taken.

104. Previously to 1801, a certificate of the proof of a deed need not state that the witness testified, that he knew the grantor to be the person described in, and who executed the deed.(1)

105. In case of acknowledgment, the identity of the grantor may be otherwise proved than by a subscribing witness, and the residence of the witness need not be stated. The latter statement is requisite only in the case of *proving* the deed.(2)

106. A certificate of acknowledgment is valid in this form—"on, &c., came A B, to me known, and acknowledged that he executed the above deed, for the uses and purposes therein mentioned." It is not necessary to say, "to me known to be the person described in, and who executed the said deed." It seems, the habitual omission of this clause amounts to a practical construction of the statute, a departure from which would disturb numerous titles.(3)

107. The certificate of the proof of a deed must set forth, that the witness stated that he knew the party who executed it. Stating that "he testified, that he saw the within grantor sign the same," is insufficient.(4)

108. A subscribing witness, in proof of a deed before a master in Chancery, testified that he saw the grantor execute it, and sincerely believed he was the person named in the deed. The master certified that he was satisfied of the due execution of the deed, and allowed it to be recorded, which was done. Held, the deed was admissible in evidence.(5)

109. It has been held, that a judge of the State cannot take the proof of a deed out of the State.(6)

110. Also, (and this is now enacted,) that the certificate of acknowledgment, &c., being *ex parte*, is not conclusive, but may be contested.(7)

111. So, that a certificate need not state that the officer personally knows the subscribing witness or the party, or has proof of his identity. And, if a new trial is moved for, for want of such statement, the court will intend a statement, that he "had satisfactory evidence of the party's being the subscribing witness."(8)

112. A certificate, made in 1711, stated that A, and B, his wife, came before the officer, "to acknowledge this indenture to be their acts and deed." Held, it should be presumed that they actually did acknowledge it, and, after such a length of time, that B privately acknowledged the deed.(9)

113. A statute of 1771 provided, that, in case of *actual possession*, a claim to lands should not be void, for want of the private examination of a wife who granted the same. Held, the act applied to the *constructive possession* of new and unsettled lands, arising from the right of property therein.(10)

(1) Bradstreet v. Clarke, 12 Wend. 602.

(2) Dibble v. Rogers, 13 Wend. 536.

(3) Jackson v. Gumaer, 2 Cow. 552.

(4) Jackson v. Osborn, 2 Wend. 555.

(5) Jackson v. Livingston, 6 John. 149.

(6) Jackson v. Humphrey, 1 John. 498.

(7) Jackson v. Schoonmaker, 4 John. 161.

(8) Jackson v. Harrow, 11 John. 434; 12 Wend. 602; Northrop v. Wright, 7 Hill, 476.

(9) Jackson v. Gilchrist, 15 John. 86. (See Jackson v. Schoonmaker, 2, 230.)

(10) Ib.

114. A feme covert is not bound by a deed, till acknowledgment; and such acknowledgment does not *relate* to the execution.(1)(a)

115. A commissioner of deeds, taking an acknowledgment, acts ministerially only, and it is no objection, that he is related to the parties.(2)

116. The county clerk, in certifying to the official act of the commissioner, and to the genuineness of his signature, also acts ministerially, and that act may be performed by a deputy; it being neither a judicial act nor one personal to the clerk himself.(3)

117. It is not necessary in the certificate of a deed executed in November, 1792, and proved in 1793, that the officer should certify that he knew the subscribing witness.(4)

118. In New York, the act of April 14th, 1820, declaring that no deed of military bounty lands, executed on or before May 1st, 1797, shall be read in evidence, unless the same has been acknowledged or proved in the manner directed by the act of April, 1813, does not apply to a deed executed in 1792, and duly proved in 1793, according to the law then existing.(5)

119. An execution purchaser, whose deed is recorded, is postponed to one in possession of the land at the time of sale, under an unrecorded deed; such possession being implied notice. In respect to notice, the rule of law, relating to a recorded and unrecorded deed, is the same with that of equity, which charges a party with notice of prior equitable rights.(6)

120. Registration is not notice, in cases where the law does not require it; as in that of a sheriff's deed. But a sheriff's deed, recorded, prevails over a prior unrecorded deed from the debtor.(7)

121. Land is liable to creditors of a grantee, though his deed be not recorded. Hence, if between the recovery of judgment and an execution sale, he convey the land, the title of the creditor has priority, the execution *relating* to the judgment.(8)

122. A deed, made for the consideration of the grantee's assuming a debt of the grantor, and recorded, shall prevail over a prior unrecorded deed.(9)

123. A conveys to B, and then to C. C conveys to D. C's deed is recorded before B's, but B's before D's. B's title prevails over D's. D,

(1) *Jackson v. Stevens*, 16 John. 110.

(2) *Lynch v. Livingston*, 8 Barb. 463.

(3) *Ib.*

(4) *Maxwell v. Chapman*, 8 Barb. 579.

(5) *Ib.*

(6) *Tuttle v. Jackson*, 6 Wend. 213.

(7) *James v. Morey*, 2 Cow. 246; *Jackson v. Post*, 15 Wend. 538. (*)

(8) *Jackson v. Winslow*, 9 Cow. 13.

(9) *Ib.*

(*) See as to this case, *Hooker v. Pierce*, 2 Hill, 650.

(a) Where the statute requires the certificate of the acknowledgment of a deed of her real estate by a married woman, to state that she executed the deed "freely, without any fear or compulsion of her husband," it was held, that a certificate which stated that she acknowledged that she executed it "without any fear, or threat, or compulsion of her husband," was a sufficient compliance with the statute. *Meriam v. Harsen*, 2 Barb. Ch. 232.

It is not necessary that the certificate of the acknowledgment of a deed by a married woman should be in the precise words of the statute, if there is a substantial compliance with the statute. *Ib.*

The word "freely," in the statute, does not import that she should have executed the deed without a motive, or as a mere act of generosity, and without any hope of present or future benefit; but it means that she should have executed the deed without constraint or coercion, or fear of injury from her husband. *Ib.*

having notice of the deed to B, and that he claims title, is a *mala fide* purchaser.(1)

124. Although the general rule, that notice to a subsequent grantee supplies the want of registry of a prior deed, is adopted in this State, yet, it seems, *implied* notice is insufficient—it must be explicit.(2)

125. But if one having notice conveys to another having none, the latter takes a good title. And notice to an agent is sufficient.(3)

126. The question of notice is one of which a court of *law* has jurisdiction.(4)(a)

127. The registry of a mortgage is notice, only to the extent of the sum specified in the registry, though it varies from the sum named in the deed. But actual notice, to a subsequent purchaser, of the true sum, will bind him.(5)

128. It seems, registry of a mere equitable mortgage or incumbrance is sufficient notice thereof to a subsequent purchaser.(6)

129. A statute, requiring all deeds previously executed to be recorded in a certain time, otherwise declaring them void as to subsequent purchasers, is binding in regard to deeds which existed, and were in a situation to be recorded, after the passage of the act and within the time fixed. But a statute, which immediately and necessarily impairs a vested right, under a prior conveyance, is void in relation thereto.(7)

130. The words “purchaser for *valuable consideration*,” imply a *bona fide* purchase. Hence, where an act declares a deed not recorded to be void against such purchaser, proof of *mala fides* on his part is admissible to sustain such a deed. These words also import the advance of a new consideration, or relinquishment of some security; not the mere payment of a pre-existing debt.(8)(b)

(1) Jackson v. Post, 15 Wend. 588.

(2) Jackson v. Given, 8 John. 137; Jackson v. Sharp, 9, 163.

(3) Jackson v. Burgott, 10 John. 457; Jackson v. Elston, 12, 452.

(4) Jackson v. Burgott, 10 John. 457.

(5) Frost v. Beekman, 1 John. Cha. 288; Parkist v. Alexander, Ib. 394.

(6) Ib.

(7) Varick v. Briggs, 6 Paige, 323.

(8) Van Rensselaer v. Clark, 17 Wend. 25; Dickerson v. Tillinghast, 4 Paige, 215.

(a) In case of a deed to husband and wife, she paying the consideration, notice to him of a prior deed will not bind her. Otherwise, where he pays the consideration. So, one joint tenant or tenant in common is not bound by notice to the other, unless there is a trust or agency. Snyder v. Ponable, 1 Hill, 567.

(b) The following recent cases confirm the principles stated in the text:

The recording of a deed is constructive notice to all the world of its existence. There is no difference between its effect and that of actual notice, so far as respects the person receiving it. Schutt v. Large, 6 Barb. 373.

The recording acts protect none but innocent and *bona fide* purchasers and holders; not those who purchase with knowledge or notice of a defect in the title. Ib.

In ejectment, by one claiming under an unrecorded deed, against a subsequent purchaser, the questions of notice to the latter of the prior deed, and of good faith on his part in making the purchase, are material questions, and should be submitted to the jury. Ib.

Although a subsequent innocent purchaser will hold as against a prior grantee, in an unrecorded deed, yet his title gives him no right to the rent and income, which accrued before the recording of his own deed. Strong v. Dollner, 2 Sandf. 444.

So, where land occupied by a tenant under a lease was subject to a mortgage, the mortgagor conveyed the premises, the tenant *attorned*, the mortgagee filed a bill to foreclose, to which the grantee was not made a party, on which the premises were sold, and the deed of the master to the purchaser was recorded before that of the grantee: held, such grantee was entitled to recover the rent down to the recording of the master's deed, which was a month after the sale. Ib.

The provision of the recording act, protecting a subsequent purchaser against a prior unrecorded deed, of which he had not notice, was intended for the protection of purchasers

131. In Pennsylvania, by act of 1715, county offices of record are established: The grantor, or one of several, or else two or more of the witnesses present at the execution, are required to come before a justice of the peace for the city or county where the lands lie, for the purpose of acknowledgment. If the grantor be dead or cannot appear, the witnesses are to prove the deed. The justice to certify such acknowledgment, &c., on the back of the deed.^(a) Deeds made out of the province, to be proved by a witness before a justice of the peace in the province, or a mayor, chief magistrate or officer of the place of execution, and certified with the public seal of such place. Examined and certified copies of deeds recorded to be received in evidence. A mortgage, or defeasible deed in the nature thereof, to be invalid, unless acknowledged, &c., and recorded in six months from date. By act of 1770, past deeds of *femes covert*, executed in the common form of conveyances, are declared valid. Such deeds, in future, to be acknowledged before a judge of the Supreme Court, or a justice of the County Court where the lands lie, with a private examination of the wife. If executed out of the province, to be acknowledged in the same mode with other deeds. By act of 1775, all deeds, affecting lands in law or equity, shall be acknowledged or proved before a judge of the Supreme Court, or justice of the Court of Common Pleas for the county, and recorded within six months—otherwise to be void against a subsequent purchaser whose deed is first recorded. Deeds made out of the province shall be acknowledged, &c., (as above,) or proved before a supreme judge of the province, within twelve months—otherwise to be void, &c., as above.^(b) The act does not apply to leases not exceeding twenty-one years, attended by actual possession. Where the grantors and witnesses are dead, or cannot be had, the handwriting of the latter, or, if impracticable, of the former, may be proved before a judge of the Supreme Court, or justice of the Court of Common Pleas for the county. By act of 1785, acknowledgments, &c., may be had before the president of the Court of Common Pleas of any county, and, by act of 1791, before any assistant or associate judge of such court. By acts of 1791 and 1799, before the mayor and recorder of the city of Philadelphia, the Master of the Rolls, and the justices of the peace of the Commonwealth, in the same manner that justices of the peace might act under the St. of 1715, (sec. 127.) And, by acts of 1799, and 1817, the mayor and recorder of Philadelphia may take acknowledgments, &c., for lands in any part of the State. By acts of 1803 and 1806, an

against previous grants made by their own grantor, of which they were ignorant. It has no application to a purchaser, who derives his title from one claiming in hostility to all the parties in the unrecorded deed. *Embury v. Conner*, 2 Sandf. 98.

Under the general repealing act in the Revised Statutes, and the recording act of 1827, embraced in those statutes, the previous recording acts remain in force, with respect to prior unrecorded deeds and mortgages, at least so far as such acts relate to the rule of priority between such deeds and mortgages, or between them and subsequent conveyances. *Fort v. Burch*, 6 Barb. 60.

The open and visible possession of premises by a purchaser, under an unregistered deed, is sufficient notice to protect him against a subsequent purchaser, and to charge the latter with a knowledge of the former's rights. *Troup v. Hurlbut*, 10 Barb. 354.

(a) A witness to the probate of a deed need not sign it. The magistrate's certificate is sufficient. *Dana v. Bank, &c.*, 5 Watts & S. 223.

(b) Where there are two deeds, of different dates, between the same parties, and neither is recorded within six months; the one first recorded has priority. *Ebner v. Goundie*, 5 Watts & S. 49.

alderman of the city may take acknowledgments and proofs, where the land lies therein. By act of 1814, such alderman or any justice of the peace may do it, in case of any land in the State. By act of 1819, acknowledgment, &c., of deeds executed out of the State, is made before a U. S. judge, a judge or justice of the Supreme or Superior Court, or Court of Common Pleas, of any State or Territory in the United States, and certified under the court seal.

132. By act of 1820, mortgages take effect according to registration, except those given for the price of the land, for recording which, sixty days are allowed.

133. By act of 1826, past deeds of *femes covert*, the certificate of acknowledgment of which is defective, are made valid. By act of 1827, acknowledgment, &c., of instruments made out of the United States, may be before a U. S. consul or vice-consul at the place of execution, certified under his official seal. By act of 1828, the governor is authorized to appoint commissioners in other States, for taking acknowledgments, &c. By act of 1828, a release, or evidence of payment of a legacy charged upon lands, given to an executor, &c., assignee, trustee or guardian, if under seal, attested by two witnesses, and duly acknowledged or proved, may be recorded where the land lies.

134. By act of 1835, the necessity of a seal affixed to a certificate of proof, &c., is dispensed with both as to past and future instruments. The aldermen of the county of Philadelphia are invested with the same powers as those of the city.(1) By an act of 1841, recorders of deeds are empowered to take the acknowledgments of married women, (p. 8.) Deeds prior to the act of March 18, 1775, are to be recorded within two years from March 26, 1841; otherwise, they are not evidence, unless proved or acknowledged according to law, or unless possession has gone with the deed, (p. 106.) This provision is not to impair the rights of subsequent *bona fide* purchasers or mortgagees. *Ib.* Acknowledgments before the mayor or recorder of Philadelphia, prior to the act of January 9, 1817, which would be good under that act, are made valid, (p. 352.) By act of 1840, (p. 412,) recorders may take acknowledgments as to land in their own county. Acknowledgments, prior to April 16, 1840, before an authorized officer, by husband and wife, in the United States, or to be made after said date before the following first of January, are made good, though the certificate is defective, (p. 361.) So, acknowledgments conformable to the laws of the State where they were taken, at any time previous to the date of the act. *Ib.* By an act of 1838-9, (p. 92,) acknowledgments before commissioners are made good. By a late act, (1844, 188,) in case of past deeds of sheriffs, the certificate of the prothonotary of any court, though not under seal, is rendered valid, except against *bona fide* purchasers or holders without notice.(a)

(1) *Purd. Dig.* 193-208; *Park & J.* 169. | *Watts*, 13; *Cash v. Tezer*, 1 *Watts & S.* 528; |
See *Jaques v. Weeks*, 7 *Watts*, 261; *Behnet* | *Foust v. Ross*, *Ib.* 501; *Solomon v. Parnell*,
v. Paine, *Ib.* 334; *Bellas v. McCarty*, 10 | 2 *Miles*, 264.

(a) By act of 1850, 575, the acknowledgment of a *feme covert* may be before the judge of a court of record, out of the State, or a judge of the Court of Common Pleas, in Pennsylvania. The acknowledgment of a deed out of the State may be before a judge of a court of record.

By act of 1849, 527, a *feme covert* may acknowledge, out of the United States, before a minister, ambassador, *charge d'affaires*, consul or vice-consul of the United States. Acknowledgments may be had before a judge of Probate, or a court of record out of the State. *Ib.* 520.

135. A deed dated prior to the act of 1775 is good without registration.(1)

136. Where a deed is unrecorded, a second grantee may avail himself of improvements made by him on the land, by way of a consideration, which will give him the prior title.(2)

137. Where a bond of defeasance is unrecorded, but the deed is recorded, the transaction stands like an unrecorded mortgage, which is postponed to a subsequent judgment.(3)

138. The above acts of 1715, 1770, 1775, and 1814, are *in pari materia*, and, therefore, in all the cases for which they provide alike, a seal is necessary in the certificate of acknowledgment, &c. (So it has been held, that the seal of a justice is necessary to a certificate; and registry without it is of no avail. (Altered' by statute, sec. 134.)(4)

139. Husband and wife conveyed by a deed defectively acknowledged. After her death, her heirs recovered the land and occupied it for seventeen years. The above act, (sec. 128,) for curing defective deeds of *femes covert*, was then passed. Held, the grantee might recover back the land.(5)

140. The recording acts do not apply to the assignment of an insolvent debtor. Nor does the act of 1775 apply to the assignment of all one's right in a sum of money, charged by agreement upon land in lieu of dower, the interest payable to the widow during her life, and the principal, after her death, in part to the assignor. And it seems this act does not apply to the assignment of a mortgage. But the act does apply, it seems, to conveyances affecting lands, though not signed and sealed, and authorizes the admission of exemplifications in evidence, after acknowledgment, &c., and registry. So the statutes apply to all written contracts concerning real estate.(6)

141. The registry acts do not apply to subsequent purchasers claiming under an independent title, but only to those claiming under the grantor in the former deed. They apply to subsequent purchasers at an execution sale. But registration of a deed between third persons is not notice to an execution purchaser, not claiming through and under such deeds.(7)

142. A deed, dated in 1772, might be validly acknowledged by an associate judge of a county in which the land did not lie.(8)

143. A deed, regularly proved by a witness before the proper officer, may be read in evidence, though not recorded; the registry making no part of the proof, but only giving the deed a special operation.(9)

144. A deed executed in England, and acknowledged here, though not recorded, has been received in evidence. So a deed executed there, and recorded here. So a deed, proved by a subscribing witness before a judge of the Court of Common Pleas of another State, and certified under the hand of the clerk and seal of the court, showing that such person was the judge; is legally authenticated.(10)

(1) Powers v. M'Ferran, 2 S. & R. 44; Koller v. Nutz, 5, 246.

(2) Boggs v. Varner, 6 Watts & S. 469.

(3) Friedley v. Hamilton, 17 S. & R. 70.

(4) Duncan v. Duncan, 1 Watts, 322; Barney v. Sutton, 2 Watts, 31.

(5) Mercer v. Watson, 1 Watts, 330.

(6) Ruby v. Glenn, 5 Watts, 77; Craft v. Webster, 4 Rawle, 242; Hellman v. Hellman,

Ib. 440; Brotherton v. Livingston, 3 Watts & S. 334.

(7) Henry v. Morgan, 2 Binn. 497; Irvine v. Campbell, 6, 119; Keller v. Nutz, 5 S. & R. 246. See Rigler v. Cloud, 2 Harr. 361.

(8) M'Ferran v. Powers, 1 S. & R. 102.

(9) Hamilton v. Galloway, 1 Dall. 93.

(10) Morris v. Vanderen, Ib. 66; Sandford v. Decamp, 8 Watts, 542.

145. The registering of a sheriff's deed in the prothonotary's office, according to usage, has been held a sufficient recording.(1)(a)

146. A mortgage, though not recorded within six months, has been held good against the mortgagor and a purchaser with notice. The six months allowed are calendar months.

147. A certificate of acknowledgment of a deed made by husband and wife, in this form—"A and B personally appeared and acknowledged, &c., to be their act," &c., and desired the same to be recorded, she being of full age, and examined apart; but not stating that the contents were made known to her, is insufficient.(2)

148. But a certificate, stating that the wife acknowledged "the lands in the deed mentioned to be the right of the grantee," is sufficient, because it shows that she had knowledge of the contents of the deed.(3)

149. If the certificate use the words "voluntarily consenting thereto," without stating that it was without the coercion or compulsion of the husband, this is sufficient. But the fact of the wife's voluntary consent must always appear by the acknowledgment.(4)(b)

150. In Delaware, a deed may be acknowledged in any county, before the Supreme or Common Pleas Court, or a judge thereof, the Chancellor, or two justices of the peace for the same county. So, under a

(1) Ib. 68.

(2) 1 Binn. 470. See *Ex parte Shaw*, 9 Dowl. P. C. 839.

(3) 5 Binn. 296; 1 Pet. 188.

(4) 6 Binn. 435; Pur. Dig. 210.

(a) It is immaterial, that a wrong year is indorsed on a petition, that a sheriff may acknowledge a deed made by his predecessor, where the entries on the docket and the recitals in the deed correspond and are regular; and it is immaterial that there is no description of the property sold in such petition, except the name of the former owner. *Woods v. Halsey*, 9 Barr, 144.

(b) One bound to make a title, by means of a deed from the nominal grantor, cannot take the acknowledgment of his wife, as a magistrate. *Withers v. Baird*, 7 Watts, 227.

The deed of a *feme covert* was acknowledged before a judge of the Circuit Court of the county in Indiana, being a common law court, and certified under the private seal of the clerk, the court having none. Held sufficient, under the act of 1819. *Creigh v. Beelin*, 1 Watts & S. 83.

The certificate of a justice, in relation to an acknowledgment of a mortgage by a *feme covert*, is not conclusive, but parol evidence is admissible, that it was not done of her free will and accord, but that undue means were used for obtaining it. *Louden v. Blythe*, 4 Harris, 532.

The acknowledgment of a deed, by husband and wife, of the wife's land, may be shown to have been obtained by fraud and duress of the wife, and thus avoided as to volunteers or purchasers with notice. *Aliter*, as to *bona fide* purchasers without notice. *Schrader v. Decker*, 9 Barr, 14.

A conveyed ground to B, subject to ground-rent, but neglected to put the deed on record, and B took possession of the land and retained it for more than twenty-three years. In the meantime, the ground was assessed for municipal charges, the claim for the same being filed against B as owner, or reputed owner, and was sold at sheriff's sale, on the judgment for the same, without notice of any claim against it by A. Held, that A was estopped from disputing the title of the purchaser; the object of the recording acts being to give public notice in whom the title to real estate resided, so that no one may be defrauded by a deceptive appearance of title. *Salter v. Reed*, 3 Harris, 260.

A power of attorney to convey an interest in the proceeds of real estate sold under a will, with the conveyance itself, may be recorded. *Costen, &c.*, 1 Harr. 292.

Agreement to convey to trustees for the benefit of creditors, with the power to sell. A deed was afterwards made, but the agreement was not recorded within a year. Held, the agreement was a voluntary deed, which by sec. 5 of Stat. Mar. 24, 1818, must be recorded in 30 days; and that the last deed was ineffectual against a sheriff's deed to an execution purchaser, the judgment being subsequent to both deeds. *Thomas v. Lowher*, 2 Harr. 438.

The acknowledgment of a deed before a notary of the State must be within the State. *Harris v. Burton*, 4 Harr. 66.

power of attorney, first proved. And a deed may be proved by a subscribing witness. The private examination of a *feme covert* may be in any county, before the Chancellor, a judge of either of said courts, or two justices of the peace for the same county. The certificate of acknowledgment, &c., in court, to be under seal of the clerk or prothonotary. Acknowledgment, &c., out of the State to be before a United States' district judge, the Chancellor or judge of a court of record, or said court itself, or the chief officer of a city or borough; the certificate to be under the official seal; if the acknowledgment is in court, affixed by the clerk or other officer thereof; if by a judge, the seal to be affixed to his certificate, or to that of the clerk or keeper of the seal. A letter of attorney to convey or to acknowledge may be acknowledged, &c., and recorded. A power to sell authorizes acknowledgment. But a *feme covert* cannot make a letter of attorney. The private examination of a wife is valid, though the deed be not recorded; but no other acknowledgment or proof. A deed or letter of attorney shall be recorded within one year; else it is invalid against a subsequent fair creditor or purchaser. This does not apply to a lease for fair rent for not more than 21 years, attended by possession, or where the lessee is to have possession within one year. Mortgages lodged for registry at the same time have priority according to their dates; if made for the purchase-money of land, sixty days are allowed for recording. In case of a defeasance, the grantee must indorse upon and record with his deed a note thereof. The defeasance, though unsealed, shall be acknowledged, &c., and recorded within sixty days; else it is void against purchasers, &c. Two justices of the peace, taking acknowledgment, &c., must act *together*. By a late act, commissioners in other States may take the acknowledgment or proof, (in case of refusal to acknowledge,) of deeds. If the grantor and witnesses are dead, removed from the State, or cannot be found, secondary evidence of a boundary is usually received, and the facts are minutely certified. If a deed is not proved and recorded, it is admitted in evidence, upon the common law proofs. Certified copies of recorded deeds are admitted in evidence.(1)

151. In Maryland, a deed of a freehold estate, or an estate for more than seven years, or declaring or limiting any use, must be acknowledged before two justices of the peace of the county where the land lies, or where the grantor lives, or a judge of the County Court for the former county, or mayor of Annapolis for Anne Arundel county, and recorded in this county within six calendar months from its date. Otherwise, the deed is void between the parties. But where registration has been omitted, without fraud, it may be authorized by filing a bill in Chancery, and will be effectual except against subsequent purchasers and creditors, if made within six months from a decree. Such decree may be reviewed within eighteen months. A *feme covert* may join the husband in a deed of her lands, and may release her dower without executing the deed; in each case acknowledging the deed, and undergoing a private examination. In case of acknowledgment in a county where the land does not lie, but where the party lives, the clerk of the court must certify, under the court seal, the official capacity of the acting

(1) 4 Griff 1034-41; Del. L. 89-93; 1837, 1843, 456, the time for recording deeds is 159. (See *Ib.* 1830, 19-20; 1831, 44-5; extended. By the Revised Statutes, it is one 1835, 306; 1837, 69.) By acts of 1839, 216; year. Rev. Sta. 269.

justice or judge. Where a grantor is out of the State, a commission issues, on application of the purchaser, and with the written consent of the grantor, from the clerk of the county court where the land lies, to two or more commissioners at the grantor's residence. Any two of them may take the acknowledgment, and shall certify it under seal, and return the commission to be recorded with the deed. Or the grantor may empower an attorney in the State to acknowledge for him, the power to be incorporated with or annexed to the deed, and proved by a subscribing witness before the County Court, or two justices of the county where the land lies, or a district judge, or the governor, or mayor, notary public, court, or judge thereof, of the place where it is executed; in each case the certificate to be under an official seal. A *feme covert* out of the State may acknowledge before commissioners, (as above,) or a United States' judge, or the chief magistrate, a mayor, court or judge, of the place of acknowledgment. The acknowledgment is authenticated like that of letters of attorney. The husband may acknowledge before the same officers, where the deed conveys her estate.(1)(a)

152. Though a deed made in *Delaware* will not pass lands in *Maryland*, unless executed, acknowledged and recorded, according to the laws of the latter State; yet, if the grantor, previously to making such deed, has sold the land, received a part of the price, and given bond to convey upon receipt of the balance; a deed embracing the rights and credits of the grantor will pass his interest in the unpaid purchase-money.(2)

153. An original deed, recorded, is not admissible in evidence, without proving the handwriting of the recording officer, who certifies upon the back of such deed.(3)

154. Where the official character of the person taking the acknowledgment of a deed does not appear thereupon, nor the county where it was taken, and there is no presumptive evidence of acknowledgment according to the act of 1715, a copy is not *per se* admissible in evidence.

(1) 4 Griff. 907-12. See *Brooks v. Dent*, 1 Md. Ch. Decis. 523. (2) *Houston v. Nowland*, 7 Gill & J. 480. (3) *Gwynn v. Jones*, 2 Gill & J. 173.

(a) By acts of 1825, c. 58, and 1830, c. 164, acknowledgment in another State may be before a United States judge of a court of record of the State and county where the grantor may be; the clerk, &c., to certify under seal to his official character. The deed may be recorded within six months. The examination of a *feme covert* is included in this provision. Deeds may be acknowledged in open court, in any court of record in the United States, or of any State or Territory, and certified under the court seal. See also 1831, 116. By act of 1831, ch. 205, the registry of *contracts* for lands is authorized. Also, an officer taking acknowledgments, &c., must know and certify the identity of the party. By act of 1831, ch. 304, a deed may be recorded out of the time, and is valid against the grantor, &c., and all having notice. So it is valid against all persons, if the grantee *took possession*, from the time of recording, subject to the priorities provided by the act of 1825. The statute does not apply to *mortgages*. See 1832, ch. 128; 1833, 68; 1834, 80; 1835, 165, 211, 332. It has been held, that the recording acts impose no new formality, as requisite to the validity of a deed between the parties. *Salmon v. Clagett*, 3 Bland, 172. By a late act (Feb. 24, 1842) deeds executed since Feb. 10, 1835, and not certified according to the act of 1835, ch. 205, are confirmed, with a saving of the rights of purchasers.

By St. 1849, ch. 199, deeds may be acknowledged out of the country before a consul or vice-consul.

Out of the State, before any person authorized by the laws of Maryland to take acknowledgments, &c.

But, it seems, if the grantee were proved to have occupied under the grantor's title, a legal acknowledgment might be presumed.(1)

155. A deed of a non-resident grantor, acknowledged by an attorney under a letter of attorney, proved before *one* justice of the peace, is invalid.(2)

156. The certificate of the clerk of a county court, that the persons taking an acknowledgment were then, and still are, *two justices of the peace* for such county, and to all certificates by them given *as such*, due faith, &c., ought to be given, &c., is sufficient authority for registration.(3)

157. Where a deed is seasonably recorded, but the acknowledgment omits the year when it was taken; such acknowledgment is presumed to be legal. So the acknowledgment of an ancient deed renders it admissible in evidence, though not signed or sealed.(4)

158. Where a deed is stated to be made between A and B, his wife, of the one part, and C of the other, and A, in consideration, &c., grants to C, &c., and both A and B sign, seal and acknowledge the deed, B being privately examined, B's estate does not pass, because she is not a grantor.(5)

159. A deed, made in 1782, by a non-resident and his wife, of her lands, could not be legally acknowledged by the husband out of the State. Hence, though properly acknowledged by the wife, it did not pass the land.(6)

160. The deed of a *feme covert* may be valid, though the certificate of acknowledgment vary somewhat from the prescribed form, if the sense is the same.(7)

161. The above provisions, (sec. 151,) for procuring registration by a decree of Chancery, do not apply to *an estate tail*. And registration, under such decree, after the death of a tenant in tail, grantor, does not bind his issue.(8)

162. Where a person resides in one county, and has a temporary abode in another, and the land lies in neither, acknowledgment in the latter county is invalid. But a non-resident may validly acknowledge a deed in any county in the State, before two justices.(9)

163. The time of enrolment of a deed is a question for the jury; and, if possession has been had under it, they may presume a reasonable enrolment.(10)

164. Acknowledgment, that the land in question is *the right of the grantee*, has been held sufficient.(11)

165. Separate acknowledgments before two justices of the peace are insufficient; nor is parol evidence admissible of such acknowledgments. But the official authority of an officer who takes an acknowledgment may be proved by parol evidence.(12)

(1) *Connelly v. Bowie*, 6 Har. & J. 141.

(2) *Beal v. Lynn*, 6 Har. & J. 336.

(3) 6 Har. & J. 336.

(4) *Wickes v. Caulk*, 5 Har. & J. 36; *Carroll v. Norwood*, 1 Har. & J. 178; 4 Har. & M'Hen. 222; 1, 162.

(5) *Hawkus v. Gould*, 3 Har. & J. 243.

(6) *Lawrence v. Heister*, 3 Har. & J. 371. See *Id.* 574.

(7) *Hollingsworth v. M'Donald*, 2 Har. & J. 237.

(8) *Jones v. Jones*, 2 Har. & J. 281; 1, 180; 3 Har. & M'Hen. 220.

(9) *Hall v. Gittings*, 2 Har. & J. 383; 1, 14; 2 Har. & M'Hen. 46.

(10) *Carroll v. Norwood*, 1 Har. & J. 172.

(11) *Blair v. Valliant*, 4 Har. & M'Hen. 62. But see 3, 430.

(12) 3 Har. & M'Hen. 321; *Vau Ness v. Banks*, &c., 13 Pet. 17.

166. In Virginia, where a deed, is recorded in any county or corporation court, and has become lost or mislaid; upon affidavit of a party interested, a copy from the records, certified by the clerk, may be recorded in any other county or corporation, and such recording shall be a substitute for the original deed.(1)

167. Where a power of attorney or other deed is produced, with a certificate of the clerk of a court of record of any of the United States, any Territory or district, that it has been acknowledged, or proved by the number of witnesses required in Virginia, before such court; it shall be good evidence. But the certificate must have the seal of the court, or the clerk must state that there is none, and in the latter case the presiding judge or justice must certify to his clerkship, and that the attestation is in due form. A deed thus authenticated may be admitted to record by any court of the State where deeds are usually recorded, on application of a party interested.(2)

168. Upon the certificate of the clerk of any county or corporation court, that a deed has been recorded on proof, or acknowledgment, the clerk of any other county or corporation may also record it.

169. A conveyance by writing, sealed and delivered, of any inheritance, freehold or term for more than five years, including marriage settlements, trust deeds and mortgages, and also any covenant or agreement in consideration of marriage, is void against an ignorant purchaser, for consideration, or a creditor only,(a) unless acknowledged or proved by three witnesses before the general court, or the court of the district, county, city, or corporation, where some part of the land lies, (and recorded,) within eight months from sealing and delivery.

170. When a deed is acknowledged or proved in court, livery of seizin, if necessary, shall also be acknowledged or proved, and recorded.

171. Where a party lives out of the State, or out of the district or county where the land lies, the deed may be acknowledged or proved by the requisite number of witnesses, before any court of law, or the chief magistrate of any city, town or corporation of the country where the party resides, or, if abroad, by a minister, charge, consul, vice-consul, or commercial agent, and certified by him in the usual form, and presented for record to the proper court, in eighteen months from execution where it takes place out of the State, or in eight months, if within the State; and this shall be deemed a sufficient authentication.

172. Where a married woman executes a deed, she appears in court, and is examined privately by one of the judges, as to her freely signing the instrument, and continuing to be satisfied with it, the deed being shown and explained to her. She acknowledges the deed before the court, or else before two justices of the county where she dwells, or the magistrate of a corporate town, if she lives in the United States, these officers being empowered by a commission from the clerk of the court where the deed is to be recorded, to examine her, and take her acknowledgment. The officer gives a certificate, and, the deed being acknowledged or proved by the husband, the proceeding is effectual to pass the wife's inheritance, or right of dower. If she is out of the

(1) Vir. St. 1829, 22.

| (2) Vir. St. 1827, 22-3.

(a) The same express restriction in Mississippi. Missi. Rev. C. 453.

United States, a commission runs to two judges or justices of any court of law, or the chief magistrate of any city, town or corporation in her county, and is executed as by two justices in the United States. The certificate shall be authenticated in the usual form.

173. The private examination of a married woman shall be recorded; else the deed is not binding upon her or her heirs.

174. The records of deeds are kept by the clerk of the court.(1)

175. An acknowledgment, by a grantor residing in another State, before a *court* of such State, invalid. It must be before two justices of the peace.(2)

176. A deed re-acknowledged within eight months from its date; and recorded within four months from re-acknowledgment, is valid from re-acknowledgment, though not recorded within eight months from its execution.(3)

177. A deed, though not recorded, is good evidence of title, in a suit against one who is not a creditor or subsequent purchaser.(4)

178. The registry law does not require the witnesses to a deed to subscribe their names.(5)

179. A deed, the acknowledgment or proof of which is irregularly certified, though recorded, is inadmissible in evidence as a recorded deed.(6)

180. The admission of a deed to record is a mere ministerial act, designed for the purpose of notice, and gives it no new validity.(7)

181. A peremptory mandamus lies, to compel an inferior court to admit a deed to proof and registry.(8)

182. Where a bill is filed, to impeach a deed as fraudulent, within the time allowed for recording, the court cannot afterwards declare it void, as against the plaintiff, for want of due registration.(9)

183. Under a statute allowing eight months for registration, a second purchaser was held to take a good title, who had no notice when he purchased, though he received notice within the eight months.(10)(a)

(1) 1 Vir. Rev. C. 157-60, 327; Stat. 1840-1, 76. See *Ib.* 1840, 47.

(2) *Lockridge v. Carlisle*, 2 Leigh, 186.

(3) *Eppes v. Randolph*, 2 Call, 103.

(4) *Turner v. Stip*, 1 Wash. 319.

(5) *Ib.*

(6) *Ib.*

(7) *Dawson v. Thruston*, 2 Hen. & M. 132.

(8) *Ib.*

(9) *Gibson v. Randolph*, 2 Munf. 310.

(10) *Rootes v. Holiday*, 6 Munf. 251.

(a) By the Revised Code, (p. 507,) deeds are valid, if recorded in sixty days from acknowledgment, except mortgages, deeds of trust, and contracts in consideration of marriage. The law protecting *creditors* and *purchasers* is not limited to those of the grantor, but extends to all who, but for the conveyance, might have claimed the land.

A deed, acknowledged before "aldermen" in the city of New York, may be admitted to record, though they do not certify as justices of the peace. *Welles v. Cole*, 6 Gratt. 645.

The certificate of a clerk, that a deed was acknowledged in court by husband and wife, and ordered to be recorded, is not sufficient to make it her deed. *Healy v. Rowan*, 5 Gratt. 414.

Although the statute in Virginia avoids an unrecorded deed, as against creditors of the grantor, it does not affect a pre-existing equitable estate of the grantee, acquired by purchase from the grantor. *Withers v. Carter*, 4 Gratt. 407.

A deed lost after it was executed, and before it was recorded, is void as against the creditors of the grantors, and cannot be set up against them in a suit by the grantee, brought more than eight months after its execution. *Ib.*

Acknowledgment before justices of the peace, and their certificate thereof, is not conclusive evidence of a complete execution of the deed; but it may be shown by parol, that such was not the intention of the grantor. *Hutchison v. Rust*, 2 Gratt. 394.

The act 1 Rev. Code of Virginia, c. 99, sec. 15, p. 365, in relation to deeds of married

184. In Georgia, a deed shall have two or more witnesses. But, if attested by a justice of the peace, or clerk of the Superior Court, prior to 1812, it is admissible in evidence. The governor may appoint commissioners in other States to take acknowledgments. They may also be taken by consuls and vice-consuls. Mortgages shall be proved or recorded within three months; otherwise, a judgment recovered before foreclosure, or a second recorded mortgage, has priority. By an act of 1827, if a deed has been recorded upon the oath of a witness, or an official attestation, though not seasonably, it is admitted in evidence. If lost, an office copy is received. Deeds having two witnesses, and made for consideration, shall be proved or acknowledged before a justice of the peace, the chief justice, or an assistant justice, and recorded in twelve months. A lease and release shall be recorded within one year. *A feme covert interested by dower or otherwise, executing a deed before lawful evidence, and making private acknowledgment before the chief justice, or a justice of the peace, is barred of dower.*(1) (Many acts have been enacted to cure defects in past deeds.)

184 a. The registry of a deed, not proved or acknowledged, according to law, is not constructive notice to a subsequent purchaser.(2)

184 b. Probate of a deed by a subscribing witness, before the clerk of the Superior Court, does not authorize the deed to be recorded, and a copy of a deed so recorded cannot be given in evidence.(3)

184 c. A failure to record a deed concerns no person, except those who derive title from the same feoffor, by a deed of subsequent date.(3)

184. d. The registration of a bond for title to land, not being authorized by law, does not entitle it to be read in evidence, without proof of its execution. Otherwise, if thirty years old, accompanied with proof of possession under it, or if produced pursuant to notice from the opposite party, he claiming, also, an interest under it.(5)

185. In Alabama, a deed shall be admitted in evidence, if it is acknowledged, or proved by a subscribing witness, before a judge of the Superior Court, or a justice of the County Court for the county where the land lies, and a certificate thereof made and signed by the officer upon or under the deed. Otherwise, a deed shall not be recorded. If the grantor or witness live in another State or Territory, the acknowledgment, &c., may be before a Supreme or District Court judge of the United States, or a judge of the Supreme or Superior Court of any Territory or State. If a grantor or witness live in a foreign State, &c., it may be

(1) Prince, 159, 160, 162, 163, 165, 166, 167, 212; Ga. St. 1839, 197.

(2) Herndon v. Kimball, 7 Geo. 432.

(3) Papot v. Gibson, 7 Geo. 530.

(4) Whittington v. Wright, 9 Geo. 23.

(5) Beverly v. Burke, 9 Geo. 440.

women, does not embrace powers of attorney, and does not authorize two justices to take and certify the privy examination of the wife as to her execution thereof. *Shanks v. Lancaster*, 5 Gratt. 110.

A power of attorney for the conveyance of lands, falls both within the letter and spirit of the act regulating conveyances, (1 Rev. Code of Virginia, c. 99, sec. 7, p. 363,) authorizing deeds to be acknowledged before any two justices of the peace, for any county or corporation of the United States; and the certificate of the justices is sufficient for the admission of the power of attorney to record with the conveyance, although it does not certify the instrument to any court or clerk's office, for the purpose of being recorded. *Ib.*

A clerk of the County Court indorsed on a deed, that it was on that day exhibited in his office, acknowledged by the parties thereto, and admitted to record. In fact, the deed was acknowledged and the certificate indorsed thereon out of the office, and was then taken by the clerk to the office, and deposited there. Held, the deed was valid as a recorded deed from the date of the certificate. *Carper v. McDowell*, 5 Gratt. 212.

before a court of law, or the chief magistrate of a city, borough or corporation. These provisions apply to *femes covert*. If the grantor or witnesses are dead, or cannot be had, the handwriting of the latter, or, if that is impracticable, of the former, may be proved, (as above.) Another act provides for acknowledgment, &c., before a superior judge, or justice of the quorum of any county court. The form of certificate is described, but need be only substantially complied with. Where the grantor lives out of the *territory*, the acknowledgment may be before the judge of any court, or a notary public, of the State, &c., in which he resides. There shall be a certificate of the clerk of the court that the former is a judge, and deserving of due faith and credit, with his seal of office annexed. The clerks of the superior and county courts may take acknowledgments and releases of dower in their own counties.^(a) So, also, any two justices of the peace, and the judges of the circuit and county courts. (The past acts of the latter are also made valid.) So also, the clerks of the circuit courts in any county, and notaries public for their own county. (The past acts of the latter two are also made valid. So also, those of a justice of the peace, a justice of the county court, or of the circuit court. But the rights of third persons are saved.) Six months are allowed for recording, and the deed is good between the parties without registry. (By numerous successive acts, the time for recording past deeds is extended.) If the record of a deed is lost by casualty, it may be recorded within eighteen months thereafter. A deed is good from registry, (though not seasonably recorded,) except against some intervening title. To pass the estate of a *feme covert*, she shall be privately examined before a judge of the Territory, or justice of the County Court. Her deed will then release dower and pass her lands. By act of 1812, a wife may release her dower in lands previously conveyed, before a judge or justice of the quorum of the Territory, or judge or justice of any court, or a notary in any other State, &c. Deeds of trust, mortgage and for security, take effect from registration.^{(1)(b)}

186. In Mississippi, the conveyance by writing, sealed and delivered, of any inheritance, freehold, or term for more than one year, is invalid against a creditor or an ignorant purchaser for consideration, unless acknowledged, or proved by one or more witnesses, before a judge of the Supreme Court, a justice of the County Court, a justice of the peace, or notary public, of the county where the land lies; and unless there is a certificate thereof upon or under the deed, written and signed; and the instrument is recorded. The provision applies to any covenant or agreement in consideration of marriage.⁽²⁾

(1) Aik. Dig. 88-93; Sts. 1849, 50, 67. Williams v. Jones, 2 Alab. (N. S.) 314. See Swift v. Fitzhugh, 9 Por. 39; Johnson v. McGehee, 1 Alab. (N. S.) 186.

(2) Missi. Rev. C. 452. See Hall v. Thompson, 1 Sm. & M.; Cocke v. Halsey, 16 Pet. 71.

(a) Clerks of county courts may take and certify acknowledgments and proofs of deeds, whether the lands lie in their own counties or not. Clay's Dig. 157-8. It has been held, that an acknowledgment before a judge or clerk need not be authenticated by a seal. His handwriting may be proved by witnesses. Powers v. Bryant, 7 Por. 10. Registration is not legal notice, unless the grantor is either in possession, or appears by the record to have connection with the title. Fenno v. Sayre, 3 Alab. (N. S.) 458.

(b) A post-nuptial settlement, made in virtue of an ante-nuptial contract, need not be recorded. Swift v. Fitzhugh, 9 Por. 39. The probat of a deed must substantially conform to the statute. The witness must make oath to the subscription of all parties, by name; that the witnesses signed in the presence of the grantor and of each other, and at the time named. Fipps v. McGehee, 5 Port. 413.

187. All deeds, agreements, &c., relating to land, except instruments of trust and mortgages, if recorded in three months, take effect from their execution. Deeds of trust and mortgages, and other instruments recorded after three months, take effect from delivery to the recorder. But of two deeds delivered to the recorder on the same day, the one first executed has priority.(1)

188. All written contracts relating to land may be acknowledged, or proved and recorded; and the recording is legal notice. But no instrument shall be recorded without acknowledgment or proof. The clerk shall give a receipt for deeds left for record.(2)

189. If a grantor of lands in the State, or the witnesses to the deed, live in another State or Territory of the Union, the deed may be acknowledged or proved before, and certified by, a judge of the Supreme Court or District Court of the United States, or a judge or justice of the Supreme or Superior Court of any State or Territory in the Union; or the judge of an inferior or county court of record; or a justice of the peace of the State and county where they reside, certified by the clerk or register of the Superior, County, or Circuit Court of such county, with an official seal. If before a justice of the peace, by a certificate of said clerk or register, or the clerk or register of said inferior or county court of record of such county, with an official seal. By a late act, a wife may convey her land according to the former statute, and release her dower. So she may constitute an agent by joint power of attorney of herself and husband, acknowledged as above. If such grantor or the witnesses live in a foreign country, the deed shall be acknowledged or proved before a court of law, or the chief magistrate of a city, borough or corporation in the county, and certified "as such acts are usually authenticated by them or him." These provisions are made applicable to acknowledgments of deeds "with relinquishment of dower," made by *femes covert*.(3)

190. If the grantor or grantors, witness or witnesses, in a deed, be dead or absent, so that they cannot personally attend, a judge of the Supreme Court, justice of the County Court, justice of the peace, and notaries public of the proper county, may, under oath or affirmation, take the examination of witnesses to prove the handwriting of the deceased or absent witness, or, if this cannot be had, of the grantor or grantors; which examination shall be certified upon or under the instrument, and signed by the officer taking it. Upon this proof, the deed may be received in evidence, and recorded.(4)

191. The proof or acknowledgment of a deed before a judge of the County Court is valid, though the land lies in another county, if accompanied by a certificate of the clerk of the court, with his seal, that the party is a judge, and that his official acts are entitled to due faith and credit. This condition is made applicable to the deeds of *femes covert*.(5)

192. No estate of a *feme covert* shall pass, without a private acknowledgment before a judge of the Supreme Court, or justice of the County Court, or a justice of the peace authorized to take acknowledgments in general, that she executed the deed "freely, without any fear, threats,

(1) Missi. Rev. C. 453-4.

(2) Missi. Rev. C. 454-5.

(3) Miss. Rev. C. 455-6; Miss. St. 1841,

(4) Ib. 456.

(5) Ib. 456-7.

or compulsion of her husband." There shall be a certificate on or under the deed, signed by the judge or justice; and "a deed so executed shall release and bar the *right of dower*." Where a deed has been made by the husband alone, and recorded, the same proceeding may be had on the part of the wife, and the certificate recorded, which shall pass her estate.(1)

193. Where a deed is lost, a record copy is good evidence.(2)(a)

194. In South Carolina, in the district of Charleston, deeds (including mortgages of leaseholds) are recorded in the office of the *register of mesne conveyance*: in other districts, by the clerks of the Circuit Court for each district. Six months are allowed from delivery, when the grantor resides in the State; twelve months, if in another of the United States; and two years, if abroad. By a late act, a mortgage is valid against a purchaser, &c., without notice, if recorded in sixty days. Marriage settlements, to be good against creditors, shall be proved and recorded, or lodged in the Secretary of State's office, within three months, if made in the State; otherwise, in twelve months. It is also provided, that a *memorial*, or brief abstract, of all conveyances, be recorded in the same office. A *feme covert* may release her dower, or convey her own estate, by joining her husband in a deed, and being privately examined, in the latter case, seven days afterwards, before a judge of law or equity, or a justice of the quorum. She may release dower by a separate deed. The certificate of the officer is under seal, and signed by the woman, and the deed has no effect till recorded. Deeds, in general, must be acknowledged before a judge of the Supreme Court, or upon the oath of one witness before a magistrate. (The uniform practice is said to be, to *prove* execution by a witness before a *magistrate*.) Where a deed is executed out of the State, the justices of the county where the land lies may, by *dedimus*, empower two or more justices of the county where the grantor resides, to take his acknowledgment upon the oath of two witnesses to the execution. (It is said, the *justices of the county* no longer exist; but, it seems, a judge of the Court of Common Pleas may issue a *dedimus*.) Where a deed has been recorded ten years, an office copy is evidence, on proof of loss, &c.(3)

195. Where a grantee takes possession of the land and retains it for the period prescribed by the statute of limitations, his title shall prevail over that of a second grantee, whose deed is first recorded.(4)

196. A *bona fide* assignment, for creditors generally, has priority over a subsequent judgment, though not recorded. So a mortgage, though not recorded, is preferred to a subsequent judgment.(5)

197. Where a first mortgage is recorded in the office of the Secre-

(1) Miss. Rev. C. 457.

(2) *Ib.* 457-8.

(3) 4 Grif. 833-9; St. 1843, 256; *Ib.* 255.

(4) *Gordon v. Parsons*, 1 Bay, 37.

(5) *Bush v. Waring*, 1 Bay, 90; *Ash v.*

Ash, *Ib.* 304; 2, 85, 251.

(a) The certificate of an officer authorized to take an acknowledgment, that the grantor made oath to the execution of the deed as his proper act, though in the form of a *jurat*, is still an acknowledgment. *Ingraham v. Grigg*, 13 Sm. & M. 22. Such certificate will be liberally construed. It need not be in the precise words of the statute, if the effect is the same. *Morse v. Clayton*, 13 Sm. & M. 373.

A deputy clerk of a probate court of Mississippi is competent to receive the acknowledgment of a deed, and it is not necessary that his certificate purport to be that of the principal clerk "by his deputy." *McCraven v. McGuire*, 23 Miss. 100.

tary of State, and a second one in the office of the register of mesne conveyance, the latter has preference.(1)

198. A sheriff's deed is within the recording act of 1785, and is void, if not recorded within six months.(2)

199. Marriage settlements must be recorded, whether *ante-nuptial* or *post-nuptial*. If made since 1785, they must be recorded within three months. The months are *calendar* months.(3)

200. The copy of a recorded deed is not admissible in evidence, without proving loss of the original. (This decision, however, has been regretted, though considered as binding; and circumstantial evidence of loss is sufficient.)(4)

200 *a*. A relinquishment of inheritance, executed before one who had failed to take the oaths of office upon re-appointment, was held valid.(5)

200 *b*. Notice, to stand in the place of recording, although not necessarily a knowledge of the entire contents of the deed, must be an explicit notice of its existence, such as the party would have if it had been recorded; it must be notice that a deed conveying the property has been executed, and that the title has passed out of the grantor.(6)

200 *c*. Actual notice of an unregistered deed is equivalent to registry, as against a purchaser at a sheriff's sale of the land conveyed thereby.(7)

201. In North Carolina, no conveyance or bill of sale of land, (except mortgages,) is good and available, unless acknowledged by the grantor, or proved by one or more evidences under oath, before a judge of the Supreme or Superior Court, or the court of the county where the land lies, and recorded in such county within two years from date. A record copy of a deed is evidence, where the original is lost. A grantee may compel the attendance of subscribing witnesses, at the Court of Pleas and Quarter Sessions, to prove the deed. Where a grantor or the witnesses are out of the State, this court may, by *dedimus*, empower two or more commissioners, in the State where the witness or witnesses or grantor reside, to take the acknowledgment or probate, which shall be certified. Where the witnesses are dead, proof of their handwriting, and that of the grantor, is sufficient for registration. Where a deed, or power of attorney to convey, has been or shall be made out of the State, but within the United States, it may be acknowledged or proved before a judge of supreme jurisdiction, or a judge of the superior courts of law, or circuit courts of superior jurisdiction, who shall attest upon the deed such acknowledgment, &c. There shall also be a certificate of the governor, or, if in the District of Columbia, of the Secretary of State of the United States, to the official character of such judge. Acknowledgments, &c., may also be before a commissioner appointed by the governor of this State. A deed thus acknowledged, &c., may be authorized to be recorded by the Court of Pleas and Quarter Sessions where the land lies, or a judge of the Supreme or Superior Court, and shall be received in evidence without further proof. Deeds, or powers of attorney to convey land, made in

(1) Connolly *v.* Stewart, 2 Bay, 509.

(2) Massey *v.* Thompson, 2 Nott & M'C. 105.

(3) Cheney *v.* Lubbock, 1 Nott & M'C. 444; Alston *v.* Alston, Con. Rep. (Tread.) 604.

(4) Purvis *v.* Robinson, 1 Bay, 493; Peay *v.* Pickett, 3 M'Cord, 318.

(5) Kotterman *v.* Ayer, 3 Strobb. 92.

(6) Wallace *v.* Craps, 3 Strobb. 266.

(7) Ingrem *v.* Phillips, 3 Strobb. 565.

a foreign country, may be acknowledged and proved, or, in case of a *feme covert*, acknowledged, before the chief magistrate of any city, town or corporation in such country, and registration may be authorized by the Court of Pleas, &c., of the county where the land lies, or a judge of the Supreme or Superior Court, and the instrument shall be received in evidence without further proof. Acknowledgment, &c., of such deed may also be made before any ambassador, public minister, consul or commercial agent of the United States, and certified under his official seal. So the private examination of a *feme covert*. In each case, registration may be authorized by the court, as above. The court may empower one or more commissioners in a foreign country to take the acknowledgment, &c., of an instrument, and the examination of a *feme covert*, and upon return of the commission adjudge the proceeding valid. A deed made by husband and wife may be acknowledged before a judge of the Supreme or Superior Court, or before the court of the county where the land lies, and the wife examined by such judge, or some member of the County Court, commissioned therefor.^(a) If acknowledged or proved on the part of the husband, and if the wife resides in another county, or is too aged or infirm to attend, the judge, or court, taking his acknowledgment, &c., may empower the clerk of the County Court to appoint two or more commissioners to take her acknowledgment, &c., which commission shall be returned and recorded. (The form of such commission is prescribed.) A *feme covert* out of the State may join with the husband in giving power of attorney to convey her lands. A deed or power of attorney, made by husband and wife, residing in another State, &c., may be acknowledged before a supreme or superior judge, or, by the wife, before two commissioners empowered by some court of record in such State, &c., she being privately examined; and the official character of the judge, or the court, shall be certified by the governor, &c., (as above provided in ordinary cases, p. 484.) A power of attorney to convey lands, if acknowledged or proved before a supreme or superior judge, or a court of pleas, &c., in the county where the land lies or the power is executed, may be recorded within twelve months from date of the deed. Deeds of gift are void, unless proved and recorded within twelve months from the making. A mortgage or deed in trust is void against creditors or purchasers, unless proved and recorded, like other deeds, within six months. As against such creditors, &c., a title passes only from registry. A mortgage, &c., may be acknowledged, &c., before the clerk of the Court of Pleas, &c., for his county. A mortgagee in an unrecorded mortgage may redeem one which is recorded; but the mortgagor loses his right of redemption. Marriage settlements and contracts shall be void against creditors, unless proved, like other deeds, within six months from the making, and recorded in one month thereafter. Errors in registration may be corrected upon petition to court, like those in patents. By act of 1835, registration of past deeds, except those of mortgage or trust, is authorized within three years, and

(a) The private examination must appear from the commissioner's certificate of the record. *Ives v. Sawyer*, 4 Dev. & B. 55. See *Skinner v. Fletcher*, 1 Ired. 313.

made valid. By a later act, registration in two years from Dec. 8, 1842, is made effectual, with the same exception.(1)(a)

201 *a*. Possession under a fraudulent deed of one tract, where the deed covers others also, is notice to a subsequent purchaser of the conveyance of the one tract only. St. 1840, ch. 28.(2)

202. The act, requiring registry of deeds of gift, applies only where creditors or purchasers are interested.(3)(b)

203. It has been held, that the testimony of the officiating justice is indispensable to prove the private examination of a *feme covert*.(4)

203 *a*. It is immaterial, whether the acknowledgment or the private examination of a wife, executing a deed, be first recorded.(5)

203 *b*. Certificate, "that the private examination of, &c., wife of, &c., taken by, &c., an officer of the court, which being satisfactory, it is ordered to be recorded;" signed by the officer. Held, insufficient, and that the estate of the wife did not pass.(6)

203 *c*. Under the act of 1751, directing a commission from the court of the county where the land lies, to issue for the private examination of the wife of the grantor, who resides in another *country*; such commission may issue where she resides in another *State*.(7)

203 *d*. The certificate of such examination need only state that she declared she had voluntarily executed the deed; not that "she doth now voluntarily assent thereto."(8)

203 *e*. Acknowledgment by husband and wife. Two justices of the peace thereupon took her private examination, reported to the court, and the court acted thereupon. Held, they should be presumed to be members of the court, appointed for that purpose, without showing a special order of appointment.(9)

203 *f*. A certificate stated the acknowledgment of a married woman, upon privy examination, to have been taken *in open court*. Held, insufficient.(10)

203 *g*. The deed of a married woman, without her privy examination, is so entirely void as to her, that even if an agreement be incorporated in it for her benefit, she cannot obtain a specific performance.(11)

204. In Indiana, the clerk of the Supreme Court shall record a deed

(1) 1 N. C. Rev. St. 224-35; St. 1842-3, 80-1; Sts. 1846, 108.

(2) *Wade v. Hiatt*, 10 Ired. 302.

(3) *Hancock v. Hovey*, 1 Tayl. 104. See 1 Hayw. 289.

(4) *Harrell v. Elliott*, 1 Tayl. 139.

(5) *Etheridge v. Forebee*, 9 Ired. 312.

(6) *Jones v. Lewis*, 8 Ired. 70.

(7) *Pierce v. Waret*, 10 Ired. 446.

(8) *Etheridge v. Forebee*, 9 Ired. 312.

(9) *Ib*.

(10) *Etheridge v. Ashbee*, 9 Ired. 353.

(11) *Askew v. Daniel*, 5 Ired. Eq. 321.

(a) By Statute 1844-5, 75, an extension of two years is allowed for registering deeds, &c., except mortgages, deeds of trust, and of swamps in the eastern part of the State.

By Statute of 1846-7, p. 136, the office copy of a deed is evidence, though the party offering it be entitled to possession of the original, and without accounting for non-production of it. Powers of attorney are to be acknowledged, as provided for deeds by the Revised Statutes, ch. 95, p. 285.

(b) See 1 Dev. & Bat. 34, 228, 582; 2 Mur. 178, 390; 2 Dev. 306; 4, 514; 3, 126; 4, 384, 56, 50; 1 Dev. Eq. 101; 1 Dev. & Bat. 173. Delivery of a deed to the register is, in law, a registration of it. *Metts v. Bright*, 4 Dev. & B. 173.

The provision as to the registration of trust deeds does not apply to a conveyance made by a husband, by way of settlement, in trust for his wife. *Saunders v. Ferrill*, 1 Ired. 97.

The several acts, enlarging the time within which grants shall be registered, make them as good and available, by relation, from their date, as if they had been registered within two years. *Hill v. Jackson*, 9 Ired. 333.

or other writing affecting the title to real estate, upon request, provided it is accompanied by a certificate of the recorder of the county where it is properly recorded, under his hand and seal, and provided also it is duly acknowledged. A deed thus recorded shall be received in evidence, like the records of the county recorders.(1)

205. Every deed or conveyance, in the nature of a mortgage, of lands in the State, shall be acknowledged or proved, and recorded, in ninety days from its execution; otherwise, it shall be deemed fraudulent and void against a subsequent purchaser, or mortgagee, for consideration, unless the former deed is recorded before the proving and recording of the latter.

206. All deeds and conveyances made in the State, of and concerning any lands, &c., therein, or affecting them in law or equity, shall be acknowledged by the grantors or bargainors, or proved, by one or more witnesses, before the recorder of a county where the land lies, one judge of the Supreme or Circuit Court, or a justice of the peace of such county, and recorded in the office of the county recorder within twelve months from execution; otherwise, they shall be held fraudulent and void against a subsequent purchaser or mortgagee, for consideration, unless the former deed is recorded before the acknowledging or proving and recording of the latter.(2)

207. If the grantors and witnesses in a deed are dead, or not to be found, a judge of the Supreme or Circuit Court, or a justice of the peace in the county where the land lies, may take the examination of a witness to prove the handwriting of the subscribing witness or witnesses, or, if this cannot be proved, of the grantor or grantors; and, upon a certificate of such proof, the deed may be recorded.(3)

208. Where any conveyance is made by husband and wife, it shall be acknowledged before a judge of the Supreme or Circuit Court, a justice of the peace, or the recorder of the county where the land lies, and such officer shall privately examine the wife, as to her free consent, reading or making known to her the contents of the deed. Her admission that she acts freely shall be held sufficient. The officer shall certify the acknowledgment under his hand and seal by an indorsement upon the deed (4)

209. A judge of the Supreme or Circuit Court, or a justice of the peace of any county, may take the acknowledgment or proof of deeds, or a release of dower in any county; and if such acknowledgment, proof or release be certified by the clerk of the Circuit Court of the county where the officer belongs, and attested by the court seal, it shall be as effectual, as if taken by an officer of the county where the land lies.(5)

210. Where a deed is made by one out of the State, if acknowledged, as above directed, before any judge or justice of the peace of the proper county where it is executed, and certified under the county seal by the proper officer, it shall be admitted to record in the county where the land lies.(6)

211. It is made the duty of the recorder of deeds, to receive and take

(1) Ind. Rev. L. 99-100. See *Doe v. Close*,
1 M'L. 282; *Orth v. Jennings*, 8 Blackf. 420.

(2) Ind. Rev. L. 270.

(3) Ib. 270-1.

(4) Ind. Rev. L. 271.

(5) Ib. 271-2.

(6) Ib. 272.

the acknowledgment of writings required to be recorded.(1) Also, to make a memorandum of the time of bringing a deed to his office, and to give a receipt for it, if required: (The last provision is also made in Ohio and Mississippi.)(2)

212. In Michigan, a deed of land, for more than seven years, signed and sealed, acknowledged and recorded, is sufficient to pass the land. The deed shall be acknowledged by the party or parties before any court of record, or notary public, or justice of the peace, in the State, the United States, or abroad, or any minister or consul of the United States abroad.(a) If the grantor dies, or leaves the State, without acknowledgment, the deed may be proved by a subscribing witness before a court of record. If the witnesses are dead, &c., the handwriting of the grantor and any witness may be proved. Pending such proceeding, a copy of the deed may be filed with the register, by way of *caution*, as in Massachusetts, &c. A certificate is indorsed upon or annexed to the deed and signed, and the deed recorded with the register for the county where the land lies. In case of a *feme covert*, a private acknowledgment is required, that she acts freely; without fear or compulsion of the husband, which shall be stated in a certificate. A deed duly recorded may be offered in evidence without further proof. By a late act, commissioners for deeds are provided for.(3)(b)

213. In Missouri, every deed of land, and every instrument affecting the title thereto in law or equity, shall be acknowledged or proved, and certified, as follows. If acknowledged or proved in the State, it shall be done before some court having a seal, or some judge, justice or clerk thereof, or a justice of the peace in the county where the land lies. If out of the State, and in any of the United States, by any court of the United States, or of any state or territory, having a seal, or clerk thereof. If out of the United States, by any court of any State, kingdom or empire, having a seal, or the mayor of any city having an official seal. Every court or officer, taking the acknowledgment or proof of such instrument, or a relinquishment of dower, or the deed of a wife of her husband's land, shall indorse a certificate thereof upon the instrument. If made by a court, the certificate shall be under its seal; if by a clerk, under his hand and the court's seal; if by an officer having

(1) Ind. Rev. L. 272.

(2) Ind. Rev. Law 418; Ohio St. Vol. 22, 223; Missi. Rev. C. 454-5.

(3) Mich. Rev. St. 257-62; St. 1839, 219; 1840, 166; 1845, 59. See *Hopping v. Buman*, 2 Greene, 39.

(a) By later acts, if the grantor lives in the State, the deed may be acknowledged before a justice of the peace, a judge of the Circuit, District, or Supreme Court, a notary public or master in Chancery, with a certificate upon the deed. If he lives in another State or Territory, then, according to the laws thereof, with a certificate of the proper county clerk, under his official seal, attached to the deed, that the execution is according to law. If the grantor is out of the country, then before a minister plenipotentiary, consul, or charge, with his certificate. St. 1839, 219; 1840, 166.

A deed executed out of the State shall not be recorded, unless it has attached to it a certificate of the proper officer, that the officer who took the acknowledgment is qualified as he professes to be.

When a deed is executed out of Indiana for land within it, and acknowledged before a justice of the peace, under the statute, the clerk of the county should certify as to the authority of the justice, and not the Secretary of State. *Strong v. Smith*, 3 McL. 362.

(b) A deed of lands in Michigan, executed in another State according to the laws of the State, is valid. *Root v. Brotherson*, 4 McLean, 230.

an official seal, under his hand and seal; if by an officer having no seal, under his hand. In order to an acknowledgment, the party appearing must be personally known to one judge or the other officer, as the signer; or proved to be such by two credible witnesses. The certificate must state this fact, together with the acknowledgment. The execution of any instrument affecting real estate shall be proved, 1. by a subscribing witness; 2. if all the witnesses are dead or cannot be had, by evidence of the party's handwriting, and that of at least one of the subscribing witnesses, such evidence to be given by two credible witnesses to each signature. In case of the proof of a deed by a subscribing witness, the witness appearing must be personally known to the judge or officer as the subscribing witness, or proved to be such by two credible witnesses, and the certificate shall state these facts, and also the names of the witnesses last named. The certificate shall not be granted, unless the subscribing witness testify that the party whose name appears in the instrument is the one who executed it; that such person executed it, and that the witness signed as such. The certificate shall state these facts. In case of the proof of a party's and witnesses' handwriting, as above provided, the witnesses must swear or affirm, that they personally knew the party and know his signature, stating their means of knowledge, and that they believe he signed the instrument, and also that they personally knew the subscribing witness and know his signature, and believe that he signed. The certificate of proof shall state the names of the witnesses, that they were sworn, and the evidence above required of them.(1)

214. In case of a release of dower, the wife must be personally known to one judge of the court, or the officer before whom the deed is acknowledged, or her identity proved by two credible witnesses. She must also be informed of the contents of the deed, and acknowledge apart that she executed it, and releases her dower freely, and without compulsion or undue influence of the husband. The certificate states these facts, and the names of the witnesses, if any.(2)

215. A wife may convey her land, but no covenant in the deed shall bind her or her heirs, except so far as is necessary to pass her interest. The acknowledgment may be made before *any court*, above authorized to take acknowledgments. The form of acknowledgment shall be the same as in case of a release of dower. Also the certificate.(3)

216. Notice of a deed commences upon the filing of it with the recorder. Till such filing, it is valid only as to parties and others having actual notice.(4)

217. Letters of attorney, and other instruments giving power to sell land, or to execute an instrument which conveys or affects land, shall be acknowledged or proved, certified and recorded. And a *revocation* is invalid, till recorded in the same office.(5)

218. An instrument, acknowledged or proved, and certified, may with the certificate be read in evidence without other proof. If lost, &c., a copy of the record is admissible. In neither case is the evidence

(1) Misso. St. 120-1-2. See Frothingham v. Stacker, 11 Mis. 77; Pearce v. Dansforth, 13 Mis. 360; Davis v. Ownsby, 14, 170.
(2) Misso. St. 122.

(3) Misso. St. 122-3.

(4) Ib. 123.

(5) Ib. 123.

conclusive; but if the deed is shown to have been proved by an incompetent witness, other proof is necessary.(1)

218 *a*. The acknowledgment of a *feme covert* may be before any judge or clerk of a court of record.(2)

218 *b*. The certificate of acknowledgment is not void, because the clerk, in reading it, adds matter not required by law.(3)

218 *c*. The certificate of acknowledgment by a married woman set forth, that she made the deed voluntarily, and relinquished her dower in the land. Held, these last words were a limitation upon her conveyance, and therefore, a fee-simple was not conveyed.(4)

218 *d*. Under the laws of Missouri, in 1821, the acknowledgment of a deed of husband and wife by the wife, she being a grantor, was sufficient to entitle it to be recorded, the only object of the record at the time being notice to the world of the existence of the deed.(5)

219. In Illinois, any instrument affecting real estate shall be acknowledged by the party, or his attorney specially authorized in writing, or proved by one or more subscribing witnesses, before a judge or justice of the Supreme or District Courts of the United States, a commissioner authorized to take acknowledgments, a judge or justice of the Supreme, Superior or Circuit Court of any of the United States or Territories, a justice of the peace, the clerk of a court of record, mayor of a city, or notary public.(a) The three last shall give a certificate under their official seal. If a justice of the peace taking an acknowledgment resides out of the State, there shall be added to the deed a certificate of the *proper clerk*, that the person officiating is a justice of the peace. If he resides in the State, and in the county where the land lies, no certificate is necessary; if out of the county, there shall be a certificate of the clerk of the county commissioners' court of the *proper county*, under seal, to his official capacity. The act gives validity to past deeds, as well as future, acknowledged in this form. The officer must personally know the party, or his identity be proved by a credible witness, and the certificate must so state, giving the name of the witness. So, upon proof of an instrument by a subscribing witness, such witness must be personally known to the officer, or his identity proved by a credible witness. The subscribing witness shall prove, that the person whose name is subscribed actually signed the instrument, and that the witness signed as such in his presence, and at his request; and the certificate states the proof made by him, and that he was personally known, or his identity proved by a credible witness—naming him.(6)

(1) Misso. St. 123-4.

(2) St. 1840-1, 29, 30.

(3) Crowley v. Wallace, 12 Mis. 143.

(4) McDaniel v. Priest, 12 Mis. 544.

(5) Meyer v. Campbell, 12 Mis. 603.

(6) Illin. Rev. L. 131-2-7-8. See Fail v.

Goodtitle, Bre. 157; Ayres v. M'Connell, 2 Scam. 308; Semple v. Miles, 2 Scam. 316; Robinson v. Rowan, 501; M'Connell v. Johnson, Ib. 528; Mann, 7 Scott, 142; Pitman v. Gaty, 5 Gilm. 186; Morgan v. Cortenius, 4 McL. 366.

(a) The act of the 19th of February, 1819, conferred no authority on a notary public, to take and certify the acknowledgment or proof of a deed. Choteau v. Jones, 11 Ill. 300.

The certificate of acknowledgment before a notary public must be authenticated by his official notarial seal; and he cannot substitute therefor a private seal or a scrawl. Mason v. Brock, 12 Ill. 273.

The certificate of acknowledgment upon deeds, made by a commissioner of another State, was not under seal. Held, the statute did not require such certificate to be under seal. Also, that the want of a date would not vitiate it. Irving v. Brownell, 11 Ill. 402.

220. If the party and the subscribing witnesses are dead or cannot be had, the officer may take proof of the handwriting of the party, and the witnesses, (if any,) by the oath or affirmation of a competent and credible witness, that he personally knew the person whose handwriting is in question, well knew his signature, stating his means of knowledge, and believes the instrument to be signed by him. Upon proof of the handwriting of the party and one witness, (if any,) a certificate is granted, stating such proof.(1)

221. A married woman may release her dower in any land to which the husband has a legal or equitable title. She joins with the husband in a deed, which is acknowledged like other deeds. Her identity shall be proved by one competent and credible witness. The officer informs her of the contents of the deed, and, upon a private examination, she must acknowledge the execution and release to be made freely, voluntarily, and without compulsion of the husband. A certificate is indorsed or annexed, stating these facts, and naming the witness.(2)

222. Where a husband and wife reside in the State, and the latter is over eighteen years of age, she may convey her land, with formalities substantially the same as those used in a release of dower. She acknowledges the instrument as *her act and deed*, and that *she does not wish to retract*. A covenant or warranty is not binding, except so far as to pass her interest.(3)

223. Where a wife is out of the State, if over eighteen, she may join her husband in any writing relating to lands in the State, and shall be barred of her dower and all other interest therein. The acknowledgment or proof is the same as in the case of a *feme sole*.(4)(a)

224. Any writing affecting real estate shall be recorded within six months(b) from execution. Otherwise, it is void against a subsequent *bona fide* purchaser or mortgagee, for valuable consideration, unless recorded before the subsequent deed.(c)

225. Powers of attorney to grant and convey, &c., or to execute or acknowledge grants, &c., shall be acknowledged or proved, and recorded; and any writing executed under them shall be good, unless a revocation by deed is also acknowledged or proved, and recorded.(5)

226. Any writing, required to be recorded, if acknowledged or proved, though not recorded, is admissible in evidence without further proof.

(1) Illin. Rev. L. 132-3.

(2) Ib. 133-4.

(3) Ib. 134.

(4) Illin. Rev. L. 134-5.

(5) Ib. 135-8.

(a) Where a husband and wife convey land of the wife, the certificate of the wife's acknowledgment will be held good, if it substantially comply with the statute. The words "does not wish to retract," used in the statute, do not form part of the certificate, but only give the wife the power of retracting before acknowledgment. *Hughes v. Lane*, 11 Ill. 123.

The certificate and acknowledgment of a deed from a *feme covert*, to convey her own land, is as much an essential part of the execution as her seal and signature; and, without it, the law presumes that it was obtained by fraud or coercion. *Mariner v. Saunders*, 5 Gilman, 113.

(b) If executed after June 1, 1829. The preceding limitation was twelve months. Illin. Rev. L. 135.

(c) An attaching creditor, who levies his attachment without notice, actual or implied, of a prior deed, has priority of such deed, though at the time of levying his execution he has received notice. *Martin v. Dryden*, 1 Gilm. 188.

227. If an original deed is lost or not in the power of the party, a transcript of the record, certified by the recorder, is evidence.(1)

228. The conveyance or assignment of a certificate of purchase, upon a sale for taxes by the auditor of public accounts, may be acknowledged before the auditor.

229. Where a resident in the State acquires land out of his county, he may record the deed in the office of the State recorder.(2)

230. The deed of a sheriff or other officer, upon a sale of land on execution, may be acknowledged or proved before the clerk of any court of record in the State, and a certificate given under the court seal.(3)

231. By an act passed July 21, 1837, the recording of an instrument is notice to creditors and subsequent purchasers, whether previously acknowledged or proved according to law or not. But such instrument is not admissible in evidence, without being proved according to the general rules of evidence. The act applies to past as well as future recordings.(4)(a)

232. In Ohio, any instrument made in the State, affecting lands therein, shall be signed and sealed, or the signing and sealing acknowledged by the grantor or grantors, in presence of two subscribing witnesses, who shall attest the signing and sealing, and acknowledge before a judge of the Supreme Court or Court of Common Pleas, a justice of the peace, notary public, or presiding officer of any incorporated town or city, who shall certify the acknowledgment on the same sheet with the deed, and also that he is satisfied from his personal knowledge, on the testimony of a witness named, that the parties are what they represent themselves; and sign the certificate.(b) Where a wife joins the husband in a deed of her land or releases her dower, the same acknowledgment is provided, and the officer shall also examine her apart, read or make known the contents, and certify the same, and that she remains satisfied, and also certify the husband's acknowledgment, as in case of other deeds.(5)(c)

(1) Illin. Rev. L. 135-6.

(2) Ib. 138.

(3) St. of Illin. 1836, 257.

(4) St. of Illin. 1837, 13-4.

(5) Ohio St. 1831, 346-9. See *Brown v. Witter*, 10 Ohio, 142; *Kinsman v. Loomis*, 11

Ohio, 475; *Livingston v. McDonald*, 9, 168; *Hubbell v. Broadwell*, 8, 120; *Magee v. Bentley*, 8, 396; *De Segond v. Culver*, 10, 188; *Good v. Zercher*, 12, 364; *Shults v. Moore*, 1 McCl. 520; *Johnson v. Sukeley*, 2, 562; *Fenning v. Wood*, 20, 261.

(a) By an act of 1840-1, all instruments relating to lands, executed in any other of the United States, and acknowledged and proved according to its laws, shall be recorded in the county where the lands lie, and be valid and effectual for all purposes; provided, the clerk of any court of record in such State certify under his hand and the court seal, that the acknowledgment or proof conforms to the law of the State. And all instruments relating to lands, heretofore recorded in the county where they lie, shall be held notice to subsequent purchasers or mortgagees. Law Rep. Oct. 1841, p. 245; Illin. St. 1841, 66-7. By act of 1853, p. 89, deeds are not invalid, by reason of informality in their execution.

(b) The recording of a deed not legally acknowledged is of no legal effect. *Dunn v. Games*, 1 McCl. 321.

But a deed is admissible in evidence, though the acknowledgment bears date prior to that of the deed; where the instrument shows that it was really made and acknowledged at the same time. *Fisher v. Butcher*, 19 Ohio, 406.

(c) It is not sufficient to certify that the wife was "examined according to law." The acts done must be stated; and the certificate must show, expressly or by implication, a compliance with the substantial requisitions of the statute. *Meddock v. Williams*, 12 Ohio, 377.

A married woman, owner of the fee of land, does not pass her title by a deed, executed by husband and wife, with relinquishment of dower, unless she joins her husband in the granting part of the deed, notwithstanding that after the description of the premises, this clause

233. A deed, executed, and acknowledged or approved, out of the State, of land in the State, is valid, if conformable to the laws of either State.(1)

234. Mortgages take effect from the record of them or presentation therefor. Any other deed shall be recorded in six months in the county where the land lies ;(a) otherwise it is fraudulent against a subsequent *bona fide* ignorant purchaser. But a record, though made subsequently, is notice from the making. Prior deeds, well executed under then existing laws, are declared valid.(b)

235. A power of attorney to convey lands in the State shall be acknowledged and certified like a deed. A wife may give a power of attorney for this purpose, which, however, remains revocable before the sale, by causing a revocation to be recorded in the county where the land lies.

236. Recorders of deeds are to have an official seal. Their certificates are made evidence of the records.

237. The above named provisions in Ohio are not to affect any lease of school or ministerial lands for a term not exceeding ten years, or any other lease for a term not exceeding three years. Nor do such provisions require that a lease of this description be attested, acknowledged or recorded.

238. The territorial laws of 1795 and 1802 virtually repealed the ordinance of Congress of 1787, in relation to the execution, proof and acknowledgment of deeds.(2)

239. One of the United States judges, empowered to take acknowledgments, may do it in any part of the Union, where the land lies in his own district.(3)

240. A sheriff's deed must be acknowledged according to law, in the county where judgment was recovered. He may validly acknowledge it, after giving up his office. But an acknowledgment by a deputy sheriff, after the sheriff's death, is invalid.(4)

241. Acknowledgment cannot be presumed.(5)

242. One who takes an acknowledgment must certify or subscribe *officially*. Otherwise, a record copy is inadmissible; and it has been held that the official character cannot be proved by parol, unless the original deed is produced. But this decision seems to have been overruled by the United States Court.(6)

243. A lease for school lands must be acknowledged before a judge or justice.(7)

(1) *Ib.*; Swan, 268; *Foster v. Dennison*, 9 Ohio, 121.

(2) *Moore v. Vance*, 1 Ohio, 12.

(3) *Ib.*

(4) *Roades v. Symmes*, 1 Ohio, 315; *Fos-*

ter v. Dugan, 8, 87; *Anderson v. Brown*, 9, 151.

(5) *Ib.*

(6) *Johnston v. Haines*, 2 Ohio, 55; *Shults v. Moore*, 1 M.L. 520.

(7) *Atkinson v. Dailey*, 2 Ohio, 213.

is inserted: "and all the estate, right, title, interest, claim, and demand of them, the said A," (the husband) "and B; his wife, in and to the premises, and every part thereof." *Purcell v. Goshorn*, 17 Ohio, 105.

(a) Where there are two conveyances, and neither recorded within six months, the latter one has priority if first recorded. *Northrup v. Brehmer*, 8 Ohio, 392.

(b) This provision has been held unconstitutional. *Good v. Zercher*, 12 Ohio, 364; *Meddock v. Williams*, *Ib.* 377.

244. Before an act of 1819, an acknowledgment before a justice need not be under seal, except in the case of husband and wife.(1)

245. An unrecorded deed is not invalid against a subsequent purchaser with notice.

246. And a violent presumption of notice, or proof of facts which imply it, is sufficient.(2)

247. Under the act of 1831, a certified copy of a recorded deed is evidence even for the grantees, without accounting for non-production of the original.(3)

248. In Tennessee, a deed, duly proved or acknowledged, may be registered at any time, so as to give it effect between the parties; and within twelve months, to make it effectual against all persons. If registered after that time, it takes effect from registration.(a) A deed or power of attorney to convey must be acknowledged or proved by two subscribing witnesses, in the court of the county, or the court of the district, where the land lies. No deed is admissible in evidence, till recorded. The acknowledgment, &c., shall be indorsed upon the deed by the clerk of the court. The deed of a *feme covert* is acknowledged, and she privately examined, before a court of record in the State, or, if the parties live out of it, a court of record in another State or Territory. If the wife is unable to attend a court, her acknowledgment, &c., may be before commissioners empowered by the court, in which the husband acknowledges, the commission to be returned, certified with the court seal, and recorded. The seal of the court need not be annexed to the certificate of acknowledgment, &c., made by the clerk; unless it is made in the State, to be used out of it, or *vice versa*, in which cases there is to be a seal, and a certificate of the presiding judge or justice to the official station of the clerk, and the due formality of the attestation. By a statute of 1820, acknowledgment, &c., in other States may be conformable to the laws of the State, where the grantor or witnesses live. The officer must certify that he is personally acquainted with the grantor or witnesses, and that he or they are inhabitants of the State; and the certificate must describe the land. There must also be a certificate of the governor or secretary, under the great seal, or a judge of the Superior Court, that the acknowledgment, &c., is in due form. The deed must be recorded within twelve months; but will be postponed, it seems, to a subsequent deed made before registration, though within twelve months. Where subscribing witnesses live out of the State, the holder of the deed may have their testimony entered in any court of record having cognizance thereof, and the probate may be indorsed upon the deed, and authenticated, according to the act of Congress which prescribes the terms on which the records of one State may be received in another. Where a witness and the grantor are dead, it is said probate may be made by proof of the handwriting. By act of 1715, a deed made within the British dominions may be acknowledged or proved before the chief magistrate of any city, town or corporation, or the governor

(1) Haines v. Lindsey, 4 Ohio, 88.

(2) Cunningham v. Buckingham, 1 Ohio,

(3) Burnet v. Brush, 6 Ohio, 32.

(a) Where the register of deeds corrects an erroneous registration, the deed, as corrected, can take effect only from the date of the alteration. Baldwin v. Marshall, 2 Humph. 116.

or commander-in-chief of any of his majesty's plantations, attested under the public seal, and recorded within one year from arrival of the deed. (It is said, however, that this act is repealed by provisions already mentioned.) A deed in fee, with the proper certificate of probate, proves itself. If it is lost, or not in possession of the party, a certified copy from the register is received, even though the probate is not recorded. Witnesses to a deed must appear, upon a summons, to prove it, under a penalty of \$200. Where lands conveyed are divided by a county line, the recording may be in either county. A deed recorded in one county may be also in others, with the same effect.⁽¹⁾ By Statute of 1817, p. 51, the future registration of past deeds, and past registrations, not made within the prescribed time, give effect to the deed, from its execution, against the grantor and all having notice. If made not more than twelve months before, registration in twelve months from the making gives a perfect title. Grants are made valid, if registered in two years from the passing of this act. Powers of attorney to convey land are required to be recorded. By Statute of 1821, p. 66, a registered deed is valid, if acknowledged or proved conformably to any subsequent law. By Statute of 1827, p. 65, past deeds may be validly registered, but not as against creditors or *bona fide* purchasers. By a late act, deeds, powers of attorney, &c., may be proved by two subscribing witnesses, or acknowledged, in order to registration. If done out of the United States or the State, or if the grantor or any witness is thus absent, the deed may be proved by two witnesses, or acknowledged before a notary, who shall certify the same under his seal, or a judge of the Supreme or Superior Court, who shall certify it under his hand, the clerk certifying his judicial character, under his official seal, if any, if not, his private seal; or a court of record, the clerk certifying as above, and the judge, chief justice or presiding magistrate certifying that he is clerk; or a consul, minister or ambassador, who shall certify under his seal; or a commissioner, appointed by the governor. *Femes covert* may acknowledge in the same way. Past deeds, conforming to the above requirements, are made valid, except as against creditors or purchasers without notice. (The same act makes certain provisions as to former defective proofs or registrations of deeds.)^(a)

249. The probate of a deed in these words—"this deed of conveyance was acknowledged in open court, and ordered to be registered"—is insufficient. So also, the following probates. "W. County, August Sessions, 1799. This deed was duly admitted to record, let it be registered." "W. Co. May Sessions, 1802—this deed recorded, let it be registered." "This deed was fully proven in open court; let it be registered." "State of N. C., Washington Co., Feb. Sessions, 1790; then was the written deed acknowledged in open court; let it be registered." So the following probate. "At a court held for Wilson Co., Dec. 22, 1800, this indenture was proved by the oath of A B, a witness thereto, and ordered to be registered."

(1) 4 Griff. 751-64; Tenn. L. 1839-40, 48; 514; Wilks v. Fitzpatrick, Ib. 54; Knowles Brown v. Babidge, 1 Meigs, 1; Peaton v. Peacock, 1 Humph. 135; Gaines v. Catron, Ib. v. Masterson, 3 Humph. 619.

(a) Acts of this nature have been adjudged constitutional, as affecting remedies, and not rights. Hughes v. Cannon, 2 Humph. 589.

250. But a probate indorsed on the deed in this form is good; "then was the execution of the written conveyance duly acknowledged in open court by A, the grantor, &c., and admitted to record; let it be registered."(1)

251. A deed takes effect from the date of acknowledgment.(2)

252. After a great lapse of time, everything is to be presumed in favor of a probate. It is sufficient that enough is stated by the clerk, though informally, to show that a witness was sworn, or the deed acknowledged.(3)

253. A deed was proved by one of the witnesses in 1830; and the handwriting of the other, who lived in Arkansas, was proved. Held, the probate was invalid.(4)

254. A writing, purporting to be a deed, is not evidence, though recorded, without a probate.(5)

255. Conveyance of lands, lying in the Indian boundary, by a non-resident grantor. The deed was proved in Davidson county, and recorded in D. and Stuart counties, the land then lying in the latter. Held, the probate and registration were sufficient.(6)

256. A deed made in consideration of marriage, but not proved and registered within a year, takes effect from registry, and has priority of a subsequent voluntary deed, which is proved and registered within the year, and before registry of the first deed.(7)

257. In Kentucky,(8) a deed for more than five years is void against a subsequent purchaser without notice, or a creditor either prior or subsequent, unless acknowledged or proved by two witnesses, and lodged for record within eight months. In regard to deeds of mortgage or of trust, the time is sixty days. Deeds are usually recorded by the clerk of the county where the land lies; but may be, also, in the office of the general court and Court of Appeals; and this is usually done, where the lands lie in different counties. Acknowledgment, &c., is made in open court, or before the recording clerk. If out of the State, before a court, or the chief magistrate of a city, town or corporation, of the county where the grantor dwells, and certified in the usual manner. These provisions apply also to the private examination of a *feme covert*, (except that it is made before a judge of the court.) If she resides in another State, before two justices of the peace of her county,(a) commissioned by the recording clerk. They may also take the acknowledgment of the husband. Their commission is returned, with a certificate under seal. If the wife resides abroad, the commission runs to two judges or justices of a court, or the chief magistrate of any city, &c., of the country, to be returned with a certificate in the usual form. A certificate of acknowledgment is under the seal of the

(1) *Lipe v. Mitchell*, 2 Yerg. 400; *Ib.* 108. *Smith v. Boren*, 2 Yerg. 238; *Malone v. Stevens*, *Ib.* 520; *Yenger v. Young*, 6, 261; *Love v. Shields*, 3 Yerg. 405.

(2) *Robertson v. Sullivan*, 2 Yerg. 91.

(3) *Cox v. Bowman*, 2 Yerg. 108.

(4) *Hightower v. Wells*, 6 Yerg. 249.

(5) *M'Iver v. Robertson*, 3 Yerg. 84.

(6) *M'Culloch v. Eudaly*, 3 Yerg. 346.

(7) *Cains v. Jones*, 5 Yerg. 250.

(8) 4 Griff. 1107-12; *St. of Ky.* 1836-7, ch. 379. See *Bell v. Fry*, 5 Dana, 342; *Collins v. Boyd*, *Ib.* 316; *Stevens v. Barnett*, 7, 258; *Applegate v. Gracy*, 9, 217; *Gray v. Patton*, 2 B. Monr. 14; *Bank, &c. v. Huth*, 4, 445.

(a) The certificate of two justices, though without a seal, is sufficient. *Thompson v. Robertson*, 9 B. Mon. 383.

officer, if he has one. Certified copies of recorded deeds are received in evidence. Provision is made for recording deeds which pass mere equitable titles.(a)

258. A deed, though not seasonably recorded, is valid, except against creditors, &c. So, it is preferred to a later deed first recorded, but not within the time prescribed. But the clerk's certificate, of the execution of a deed, is not sufficient, unless it was acknowledged within the legal period.(1)

259. The record of a deed is no notice, unless made in the county where the land lies.(2)

260. A deed made by attorney is not effectually registered, unless the power of attorney is recorded in the same office. The clerk may effectually record such deed, without inquiring into the validity of the agency.(3)

261. In case of acknowledgment in open court, the certificate need not state who acknowledged it.(4)

262. A deed, seasonably recorded, *relates* to the date. And it has been held, that the time within which it must be recorded is computed from the date.(5)(b)

263. At the date of a deed, the land lay in F county, but, at the time of registry, in the new county of J. Held, it should be recorded in J.(6)

264. A certificate by a clerk, that a *feme covert* relinquished *her right of dower* in land owned by herself, is insufficient to pass the land.(7)

264 *a*. The deed of a *feme covert* takes effect only from registration. Hence, if she dies, without registration of the deed within the time fixed by law, the land descends to her heirs.(8)

264 *b*. By the act of 1810, deeds may be acknowledged before any county court clerk, and, when duly certified, recorded in any county court where the land lies. The clerk taking the acknowledgment may also take the privy acknowledgment of the wife, which, being duly certified, will pass her title; and any county court clerk may take the relin-

(1) 2 Bibb, 423; 3 Marsh. 12; 1, 280; 2 J. J. Mar. 433; Cook v. Totton, 6 Dana, 110.

(2) 1b.

(3) Taylor v. McDonald, 2 Bibb, 423; 3 Marsh. 92; Stewart v. Hall, 3 B. Mon. 220. See Voorhies v. Gore, Ib. 529.

(4) Lit. Sel. C. 221.

(5) M'Connell v. Brown, Lit. S. C. 462, 6.

(6) Garrison v. Hayden, 1 J. J. Marsh.

222.

(7) Tevis v. Richardson, 7 Mon. 661.

(8) Scarborough v. Watkins, 9 B. Mon. 540.

(a) By an act of 1831, acknowledgment out of the State may be before a judge of the place where the grantor resides. So the private examination of a wife. The clerk to certify to the official character of such judge. The necessity of a commission to take a private examination is dispensed with. A wife may join in a power of attorney made out of the State, which shall be acknowledged, with a private examination, before a judge or mayor, and recorded at the same time with or before the deed. Aldermen may take acknowledgments, &c., and releases of dower, out of the State, to be certified by the recorder or other proper officer of the city under his official seal, or, if he has none, his private seal. Also, abroad, a mayor, United States consul, or the chief magistrate of the State, &c. The deed to be recorded within two years. Provision is made for acknowledging, &c., deeds at *any time*, and recording them in four months therefrom; also, for *renewing* deeds by bill in Chancery. Clerks, and their sworn deputies, may take acknowledgments, &c., within their county.

(b) But in a later case, it is decided, that registration must be a certain time after the *delivery*, not the date of the deed. Ford v. Gregory, 10 B. Mon. 175.

quishment of a *feme covert* on a private examination, without taking the acknowledgment of its execution by the husband.(1)

264 c. Under the act of 1831, a commission need not issue to justices of the peace, to enable them to take the relinquishment of dower, or the acknowledgment to deeds of *femes* residing in or out of the State, conveying lands therein.(2)

265. Acknowledgment before a clerk has none of the incidents of fine and recovery. He has no authority to inquire into personal disabilities, or to act as guardian of one subject to them. Hence, such acknowledgment does not render valid the deed of an infant.(3)

266. If a mortgage without either seal or scroll be recorded, this is not legal notice thereof. But a purchaser with *actual* notice will be estopped in equity.(4)

267. In Arkansas, where a grantor lives in the State, the deed is acknowledged before the Supreme or Circuit Court, the judge or clerk of a county court, a presiding judge, justice of the peace, or notary public. If in another State, &c., before a United States or State court, having a seal, the clerk thereof, the mayor or chief officer of a town, &c., having a seal, or according to the laws of such State, with the certificate of the clerk, or proper certifying officer of a court of record, &c.(a) If the grantor is abroad, the acknowledgment is before a court having a seal, a mayor, &c., (as above,) or any officer, having the proper authority in that place, and an official seal. If in the United States, there must be a seal; if none, an official signature. If abroad, there must be a seal. Where a certificate is made in court, it must be signed by the clerk. Where the grantor's witnesses cannot be had, the proof may be by a witness or an affidavit, with an indorsement on the deed. If there has been no acknowledgment, and the witness cannot be had, the handwriting of the grantor and one witness may be proved by the depositions of at least two witnesses to each. A *feme covert* shall be privately examined. A power of attorney to convey shall be recorded with the deed. Instruments acknowledged as above are received in evidence, but the proof is not conclusive.(b)

(1) Ford v. Gregory, 10 B. Mon. 175.

(2) Shelton v. Deering, 10 B. Mon. 405.

(3) Jones v. Todd, 2 J. J. Marsh. 359.

(4) Portwood v. Outton, 3 B. Monroe, 233.

(a) A trust deed was acknowledged before a notary, in Louisiana, subscribed before two witnesses, their names and attestations affixed, authenticated by the notary, with a certificate of the governor as to his commission, &c. Held, insufficient. 2 Pike, 315.

An acknowledgment before a clerk of the court is not good, without evidence that he was clerk. Wallace v. Dewey, 3 McLean, 548.

(b) In Wisconsin, (Rev. Sts. 326,) two witnesses are necessary in a deed. Acknowledgment shall be before a judge of a court of record, or commissioner. If in another State, before some officer authorized by the laws of that State. The certificate shall be authenticated by the certifying officer of a court of record. Acknowledgment abroad shall be before a notary, minister plenipotentiary, charge, commissioner or consul. A married woman shall be privately examined. A scroll is a good seal.

At the close of the extensive title of *Deed*, a few miscellaneous decisions may be added, relating to the *parties* to deeds, for which no appropriate place was found, in pursuing the regular order of the subject. These decisions have mostly occurred in Massachusetts, and pertain to deeds by *husband and wife*, *tenants in tail*, and *executors, trustees, &c.*

At common law, the deed of a *wife* is void; (though under an express act of Parliament, a *feme covert* may validly convey. Ellison, 2 Y. & Coll. 528.) But in Massachusetts (and all the other States, as has been seen,) the joint deed of husband and wife is good. The

wife is not liable on the covenants. Nor can she convey alone. Nothing could pass without affecting the husband's interest; and, therefore, his consent must be shown by signing the deed. Her confirmation, after his death, of his deed, is effectual.

At common law, a *feme covert* can alienate her lands only by fine and recovery; not because a consideration is unnecessary, but because the alienation must be matter of record. In Massachusetts, it has been thought the power of alienating by deed originated in the Provincial Law of 9 Wm. III. ch. 7, which authorizes a conveyance of lands by all persons "having good and lawful right or authority thereto." This act was passed in 1697, and it seems there has been no case since of a fine, &c., by a *feme covert*. Judge Story inclines to the opinion, that the practice of a *feme's* conveying her land prevailed prior to the act of Wm. III.

A husband and wife, in consideration of marriage, and for a valuable consideration, conveyed her lands to the use of themselves as joint tenants. Held, this should be construed as a feoffment to uses; that the uses were executed, and that the grantors became joint tenants of the estate. The parties might convey in this mode, as well as by an absolute deed, taking back a separate instrument from the grantee; and thereby avoid several possible inconveniences incident to the latter form of transfer; such as the death or alienation of the grantee, or an attachment by his creditors, or a claim for dower, &c.

So, where A, and B, his wife, conveyed her estate to C and his heirs, to the use of the grantors during their joint lives, and of the survivor in fee; held, the deed operated as a feoffment, and that the uses were well raised out of the seizin of C, and executed by the statute. *Fowler v. Shearer*, 7 Mass. 14; *Lithgow v. Kavenagh*, 9, 161; *Dudley v. Sumner*, 5, 463; *Colcord v. Swan*, 7, 291; *Andrews v. Hooper*, 13, 472; *Thatcher v. Omans*, 3 Pick. 521-4-5-6; *Durant v. Ritchie*, 4 Mas. 45.

A deed of the lands of a *feme covert*, in which she joins merely by relinquishing at the close all her right, and signing the instrument, is invalid.

Where husband and wife surrender her life estate to a remainder-man in tail, this is an extinguishment, not a transfer.

Deed by husband and wife, but not legally acknowledged by her. The consideration was paid. Held, this could not be taken as an *agreement to convey*, to be enforced against her heirs. *Lithgow v. Kavenagh*, 9 Mass. 161; *Livermore v. Bagley*, 3 Mass. 487; *Martin v. Dwelly*, 6 Wend. 9.

Recent statutes of several States have further enlarged the rights and powers of married women, in reference to real estate. See Penns. Sts. 1850, 549.

In New Hampshire, (Comp. Statutes, p. 379-80,) a married woman may hold real estate to her sole use, by a contract made before marriage. So, by devise or conveyance to her, to her sole use, &c., after marriage. And she shall have the same right, in respect to her separate property, to contract, sue and be sued, alone, as if unmarried. If she die intestate, the husband is entitled to curtesy in her lands.

The wife of an alien or citizen of another State, living in New Hampshire, separate and apart from her husband six months successively, may acquire and hold property in her own right.

In Connecticut, by act of 1850, (p. 27,) a married woman may purchase real estate, to her sole and separate use, with the acquisition of her personal services during coverture.

In New York, by act of 1849, (p. 528,) a married woman may take from any one, except her husband, by grant, &c., any real estate, and hold to her separate use, in the same manner as if unmarried; and a trustee for a married woman may convey to her, to her sole use.

In Maine, (Sts. 1852, 230,) married women may lease, sell, convey and dispose of their separate land, and do all other things, as if unmarried; and their husbands shall maintain no action on account of such property.

By Sts. of 1852, (p. 280,) a married woman, under twenty-one, has all the rights and powers, touching her separate property, as if of full age.

In Georgia, (Sts. 1849-50, p. 63,) the property of a wife shall be held to her sole and separate use. The husband acquires no right to it, and it shall not be taken for his debts.

In Pennsylvania, (Sts. 1848, p. 536,) all property of a woman shall continue hers, after marriage as before. So, all which she shall acquire after marriage, free from the debts or control of her husband; and she may dispose of the same by will.

In Arkansas, a wife may take property, except from her husband, which shall be her own, as if unmarried.

In Massachusetts, the deed of a *tenant in tail* bars the reversioner, &c., and issue. But there must be a good or valuable consideration. It is not sufficient, that here purports to be such consideration. But the amount of consideration makes no difference, as between the parties, and a deed to *relations* is valid. If husband and wife are joint tenants in tail, his deed bars her, though she survive him, and enter to avoid it. If the wife alone is tenant in tail, neither can bar the entailment alone. But if he convey and receive the price, and after his death she convey, acknowledging the consideration as so received, this is sufficient. Actual possession of the tenant is not necessary, if he has a present interest, and there is

CHAPTER XC.

TITLE BY DEVISE. NATURE, ETC., OF, PARTIES TO, AND SUBJECTS OF, A DEVISE.

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| <ol style="list-style-type: none"> 1. Nature and history of devises. 4. Devise is in the nature of a conveyance. 5. Form of a devise. 7. Entry by devisee, whether necessary. 12. Probate of will, necessity and effect of, as to a devise. 21. Acceptance of a devise. | <ol style="list-style-type: none"> 23. Who may devise—disabilities. 33. Who may take by devise. 49. Devisee cannot dispute any part of the will. 62. What may be devised; contingent interests, &c.; lands subsequently acquired, &c. |
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1. A *devise* is a disposition of real property by a person's last will and testament. It is said, this mode of transferring lands was practised among the Saxons, but ceased with the introduction of the Norman dynasty, being inconsistent with the principles of the feudal law. And although before the time of Glanville many restrictions of this law had been done away, yet devises were still disallowed, upon the grounds of exposure to imposition and want of notoriety. Anciently, the only devises were those *by custom*.(1)

2. It has been already stated, (Vol. I, *Use*), that the new modification of estate, known by the name of uses, was, upon its introduction, held not subject to the technical rules of the common law. Upon this principle uses were held devisable. But they ceased to be so, when changed into legal estates by the statute of uses, 27 Hen. VIII, ch. 10.

3. An act, passed five years afterwards, (32 Hen. VIII, ch. 1,) provided, that a person might devise the whole of land held in socage, and two-thirds of that held by knight service. Statute 34 and 35 Hen. VIII, ch. 5, entitled, "concerning the explanation of *wills*," allowed a devise of lands, tenements, rents or other hereditaments, in possession, reversion or remainder, or rents incident to any reversion or remainder, or any common or other profits, to any person, except corporations.(a)

(1) 6 Cruise, 5-6; Co. Lit. 111 b, and n. 1; Wild's case, 6 Co. 17; Marston v. Norton, 5 N. H. 210.

no adverse possession. Lithgow v. Kavenagh, 9 Mass. 161; Soule v. Soule, 5, 61; Wheelwright v. Wheelwright, 2, 447. See Nightingale v. Burrell, 15 Pick. 104.

In Massachusetts, registration of an *executor's* deed is not necessary as between the parties.

Where a power, without an interest, is vested in an executor, to sell land, the land may vest in an heir or devisee, or a purchaser from him, till such sale, and then be divested thereby.

Conveyance in trust with power to sell, with a proviso that the trustee's deed shall express the trusts. Held, this proviso was merely directory, and not a condition precedent of the deed.

A *guardian* made sale of real estate, but did not give bond or make oath according to law. A part of the consideration was paid, and the deed deposited as an escrow. The grantee entered, and paid all the taxes assessed, except the last, which was assessed to the guardian, he himself being one of the assessors. Held, the sale was void or voidable, and the guardian liable as trustee of the grantee, on account of the money paid. Pond v. Wetherbee, 4 Pick. 312; Braman v. Stiles, 2 Pick. 460; Bradstreet v. Clarke, 12 Wend. 602; Williams v. Reed, 5 Pick. 480.

(a) King Henry VIII prepared a bill, allowing a devise of *one-half* a man's lands, &c. The commons rejected it. Whereupon the king called together the ablest lawyers and judges in Chancery, who argued the matter; and it was decided that a devise of land was void. 4 Hume, 109; 1 Burnet, 116.

4. A devise, though taking effect after the testator's death, is founded on different principles, and governed by different rules, from a testament of chattels, being regarded rather as a conveyance, declaring the uses of the land after his death.(1) So, the validity of a devise must be determined from its terms, and without reference to future contingencies.(2)

5. No particular form is requisite to constitute a valid devise.(a) An instrument may thus operate, which is to take effect after the death of the maker, though its general form is that of a deed.

6. By indenture between A, and B and C, declaring A's intention to raise portions for his children, and pay his debts, A settled his lands on B and C in trust to sell, and made them executors to said uses, and signed, sealed, published and declared this to be his last will, before several witnesses. Held, a good devise. So a deed poll, to take effect after the death of the maker, and referring to a previous will, may be a valid codicil.(3)(b)

7. It is held, in England, that a devisee of land, unless he disclaims, becomes seized without entry, or the assent of the heir. If the latter enter, the former may have ejectment against him. So, also, he may, by the aid of a court of equity, compel the heir to discover and deliver up the title deeds, and thereby prevent him from setting up prior incumbrances against the will.(4)

(1) Hogan v. Jackson, Cowp. 305.

(2) Tayloe v. Gould, 10 Barb. 388.

(3) Hickson v. Witham, Finch, 195; Green v. Proude, 1 Mod. 117; Clymer v. Littler, 1 Black. R. 345. (See Wigle v. Wigle, 6 Watts, 522; Barnet, 3 Rawle, 15; Milledge v. Lamar, 4 Dessaus. 617; Dunlap v. Dunlap, 1b.

313; Sharp v. Sharp, 2 Leigh, 249;) Johnson v. Mitchell, 1 Humph. 172; Jones v. Nicholas, 2 Eng. L. & Eq. 591; Robey v. Hannon, 6 Gill, 463.

(4) Co. Lit. 111 a, 240 b; Peirce v. Smith, 1 Show. 71; Newcastle v. Pelham, 3 Bro. Parl. 460.

(a) This remark refers, of course, to the general nature and phraseology of the instrument. It will be seen hereafter, that the *form of execution* is precisely regulated by law.

(b) But where one executed a deed, setting forth a desire to prevent disputes after his death, disposing of property afterwards to be acquired, enjoining upon his trustees to pay death-bed and funeral expenses, but using no term of devise, making an immediate disposition, giving authority to the trustees to sell, &c., and do all that he could do with the property, and reserving his own "life rent," and the power of altering, &c.; held, the instrument was a deed, not a will. Thompson v. McDonald, 2 Dev. & B. 463.

An instrument may be a deed in part and a will in part. Robinson v. Schly, 6 Geo. 515.

An instrument conveying negroes, and their future increase, absolutely, to A B, his heirs and assigns, but containing the following clause, "But I do hereby save and reserve to myself a life estate in the property above conveyed to said A B, his heirs and assigns;" is a deed, and not a will. *Ib.*

Where a party executed a will, which he subsequently incorporated into a deed, conveying his estate to the parties named in the will, to be enjoyed by the grantees according to the tenor of the will, and subsequently executed codicils; held, the will was incorporated with the deed, only as to property then existing, of which it was a valid disposition, *in present*, but still remained a will as to all other property which it could affect, and was subject to modification by codicils, which might dispose of the income of the property so conveyed since. The disposition by deed was to take effect in possession only at the testator's death. Dawson v. Dawson, 2 Strobb. Eq. 34.

An instrument, for love and affection, conveys certain negroes with this condition, "Nevertheless, I have the full use of said negroes during my natural lifetime, and at the time of my death, the said negroes and their increase shall rise and be the property of the said B, her heirs, &c., firmly by these presents." Held, to be a will and not a deed. Cravy v. Rawlins, 8 Geo. 450.

A devisee, whose devise was dependent upon certain conditions expressed in the will, made a covenant in the will that he would not violate such conditions. Held, the covenant was no part of the will, and did not affect the devise. Trumbull v. Gibbons, 2 N. J. 117.

8. In Maine, it is said, that entry or something equivalent may be necessary to *actual* seizin; but the English doctrine is adopted, that the estate *vests* in the devisee upon the testator's death. And a devisee may bring an action without actual seizin.(1)

9. But in Massachusetts, unless the lands are vacant,(a) which will never be presumed, entry or something equivalent is necessary, to vest the estate in a devisee. Probate and registry of a will have not the effect of the acknowledgment and recording of a deed, which, by express statutory provision, are made equivalent to livery of seizin. The possession of a stranger, however, under or acknowledging the title of the devisee, is sufficient. So also that of a tenant in common. The above rule applies to a devisee in remainder, unless the seizin of the devisee for life is proved. If the devisee for life refuse to accept, the remainder-man may enter immediately, and he cannot enter after twenty years, during the life of the first devisee. But upon his death a new right of entry accrues to the remainder-man, and continues twenty years. So where a tenant for life *forfeits* his estate.(2)

10. The devisee of vacant land may maintain a writ of right before entry.(3)

11. The seizin of a devisee is necessary to pass an estate to his heirs.(4)(b)

12. In England, the ecclesiastical courts have no jurisdiction of devises of land.(c) Hence, the probate of a will containing such devise is no evidence in a trial at common law, but the original must be produced. These remarks, however, do not apply to terms for years, which are chattels real and personal estate.(5) It is at the option of the heir, to have the validity of a will tried in an action of ejectment, or by an issue *devisavit vel non*.(6)

13. In New York, the English law upon this point is adopted, except that a particular mode is authorized of perpetuating the evidence of a will. Other evidence is not excluded. The decision of the surrogate is not conclusive. There must be an issue from Chancery, or a trial at law.(7)(d)

(1) *Spring v. Parkman*, 3 Fairf. 127; Me. Rev. St. 610-20-1.

(2) *Williams v. Woodard*, 7 Wend. 250; *Inhabitants, &c. v. Cole*, 3 Pick. 232; *Brown v. Wood*, 17 Mass. 74; *Wells v. Prince*, 4 Mass. 64; *Wallingford v. Hearl*, 15 Mass. 471; *Stevens v. Winship*, 1 Pick. 318; *Timberlake v. Parish*, 5 Dana, 347.

(3) *Ward v. Fuller*, 15 Pick. 185.

(4) *Dally v. King*, 1 H. Bl. 1; *Brown v. Wood*, 17 Mass. 73.

(5) *Frederick v. Aynscombe*, 1 Atk. 627; *Forder v. Wade*, 4 Bro. 476.

(6) *Grove v. Young*, 6 Eng. L. & Eq. 38.

(7) *Jackson v. Hasbrouck*, 12 John. 192; — *v. Walsh*, 14, 407; *Bogardus v. Clarke*, 1 Edw. 266; *Clark v. Dew*, 1 Russ. & My. 103.

(a) In such case, entry is unnecessary. *Green v. Chelsea*, 24-Pick. 71.

(b) Devise to an infant, who died before entry. Held, her heir took the premises by descent. *Doe v. Thomas*, 4 Scott N. R. 449.

A conveyance from a devisee under a foreign will, made before the filing and recording of the will, in Maine, is good in that State, the devisee's title beginning with the testator's death. *Putnam, &c. v. Fisher*, 30 Maine, 523.

(c) So, it seems, in Maryland and South Carolina. 1 Star. 231, n. 1. In some of the States, a will may be contested in Chancery within a certain period after probate.

(d) The certificate of a surrogate, of the proving of a will before him by one of the subscribing witnesses, is not proof of the execution of the will, so as to authorize it to be read in evidence. *Staring v. Bowen*, 6 Barb. 109.

To entitle a will to be read in evidence, as an ancient will, without proof, the possession must have been in accordance with the will for 80 years; and the lapse of 30 years, without

14. In Pennsylvania, a will is good evidence of title upon proof of execution, though disallowed in the register's court. So an allowance of it there is not conclusive in its favor.(1)

15. In South Carolina, a will must be proved *de novo* in the Court of Common Pleas, though allowed by the ordinary.(2)

16. In Virginia, where a will, not duly executed to pass lands, was admitted to *probate* generally, and never contested, and the heir himself claimed under it; held, it must be taken as valid, 38 years after probate. The heir could dispute it only within seven years in Chancery.(3)(a)

17. In New Jersey, probate of a will is not conclusive, but admissible evidence, in relation to lands. But the want of it seems to be a material defect. In Kentucky(b) and Illinois, it has been held, that probate is not conclusive.(4)

18. But in Massachusetts, New Hampshire, Connecticut, North Carolina and Michigan, no will can be used as evidence of title in a common law court, until proved and allowed in a court of probate, and such probate is conclusive of its validity. If a will can be found, it may be proved in the probate office at any time, in order to establish a title to lands.(5)(c)

19. After probate of a will, the estate vests in a devisee, *by relation*, from the testator's death, and an intermediate conveyance is therefore valid. The same principle applies to the authentication in one State of

(1) Smith v. Bonsall, 5 Rawle, 80.

(2) 1 Nott & M'C 326.

(3) Vaughan v. Green, 1 Leigh, 287; Bagwell v. Elliott, 2 Rand. 198; West v. West, 3, 373; Nalle v. Fenwick, 4, 585.

(4) Denn v. Allen, Penning. 42; Rogers v.

Thomas, 1 B. Monr. 393; Rigg v. Wilton, 13 Illin. 15.

(5) Shumway v. Holbrook, 1 Pick. 114; Spencer v. Spencer, 1 Galli. 622; 1 Star. 231, n.; Mich. Rev. St. 275; Poplin v. Hawke, 8 N. H. 124.

such possession, is not sufficient, especially where one of the subscribing witnesses is still living, and resides within the State, but is not produced. Ib.

Although equity will not entertain jurisdiction, to set aside a will of real estate for fraud, or on the ground of the testator's incompetency, when there is a perfect remedy at law, and the objection is taken in due season; yet the objection comes too late on appeal, where the parties have submitted themselves to the jurisdiction of the subordinate court, and gone to a hearing upon the merits. Clarke v. Sawyer, 2 Comst. 498.

(a) A will undertaking to dispose of both real and personal estate, attested by one witness only, and admitted to probate, on his proof, and no suit being brought to set it aside for seven years, is valid, as to the disposition of lands, as well as personalty. Parker v. Brown, 6 Gratt. 554.

Upon appeal from a decree, establishing a will on the issue of *devisavit vel non*; held, the verdict in favor of the will, sanctioned by the opinion of the court, before which the issue was tried, concluded all mere questions of fact depending upon the credit to be given to the witnesses, and it must be taken that all the requirements of the statute, in order to establish a will, were satisfactorily proved. Held, also, that one of the questions of fact so determined, by the finding of the jury, was the identity of the paper attested as the last will, with the one offered for probate. Jesse v. Parker, 6 Gratt. 57.

(b) But the later doctrine is, that the probate or rejection of a will by the proper tribunal, having the case regularly before it, is, like a sentence *in rem*, conclusive, while it remains in force, in that and all other courts, and between all persons; whether parties to the record or not, and subject only to reversal by appeal, writ of error, or bill in Chancery, under the act of 1797. Tibbatts v. Berry, 10 B. Mon. 473.

The jurisdiction of the Court of Chancery, over wills, is local, and confined to the county where the will was proved. McCall v. Vallandigham, 9 B. Mon. 449.

(c) In South Carolina, a testament of chattels cannot be proved thirty years from the testator's death. Davis v. Port, Tread. Const. 505. In Rhode Island, the probate of a will in Massachusetts is held conclusive in relation to lands. Tompkins v. Tompkins, 1 Story R. 547.

a will originally proved in another. Upon any other principle, the devisee would not be entitled to the mesne profits. Moreover, it is in general expressly provided, that *undevise*d land alone descends to heirs.(1)

20. It seems, where the words of an unattested will leave it doubtful, whether it was the intention to dispose of real or personal estate, or both, evidence *aliunde* is admissible, in regard to the nature and circumstances of the estate, in order to determine the sufficiency of the probate. But whether, if in terms the will devises real estate, evidence is admissible that the testator had none, *qu?*(2)

21. *Acceptance* of a devise, which is a bounty, will be presumed, where it draws after it no charge or risk of loss, and the devisee will not be barred without a positive disclaimer.(3)

22. A devisee received a portion of the property devised to him, and, fourteen years after probate of the will, filed in the Probate Court a disclaimer, under seal, of another portion, of which he never took possession. Held, there was no acceptance, and that the disclaimer need not be by deed.(4)(a)

23. With regard to the persons who are capable of devising, it is said, the statute of wills mentions four disabilities.(b)

24. The first is *infancy*. In some of the United States this disability is removed. In Maryland, Illinois, Mississippi and Ohio, an unmarried female at the age of eighteen may devise.(5)

25. It is said, that under this statute, a *feme covert* cannot devise. But it has also been said, that by the statute of wills, *femes covert* were not expressly excepted, but the exception was implied, and afterwards affirmed by another act.(6)

26. In New Hampshire, Connecticut(c) and Ohio, a wife may devise her lands; but not, in New Hampshire, to the prejudice of her husband. In Illinois, she may devise her separate estate. In Missouri and Arkansas she cannot devise, unless empowered by marriage settlement, or written ante-nuptial authority of the husband.(7)(d)

(1) Spring v. Parkman, 3 Fairf. 127; De Wolf v. Brown, 15 Pick. 462

(2) Brown v. Thorndike, 15 Pick. 388.

(3) Brown v. Wood, 17 Mass. 73-4; Timberlake v. Parish, 5 Dana, 347; Webster v. Gilman, 1 Story R. 499

(4) Ward v. Ward, 15 Pick. 511.

(5) 4 Grif. 919; Illin. Rev. L. 61; Allen v. Little, 5 Ohio, 65; Missi. Rev. C. 32.

(6) Osgood v. Breed, 12 Mass. 525; West v. West, 10 S. & R. 445; Godol 301; Picquet v. Swan, 4 Mas. 443; Marston v. Norton, 5 N. H. 211. See St. 1 Vict. ch. 26; Whitfield v. Hurst, 9 Ired. 170.

(7) Dut. Dig. 15; Walk. 340; Illin. Rev. L. 611; Misso. St. 617; Allen v. Young, 5 Ohio, 67; Ark. Rev. St. 764; Conn. St. 226; N. H. St. 1845, 235.

(a) A will cannot impose a liability, unless by a condition which is accepted by the party to be charged. Waul v. Kirkman, 13 Sm. & M. 599.

Where land was devised to be sold, and the proceeds paid to two daughters of the testator, by whom and their husbands the lands were conveyed without a sale; held, the husbands had only a life estate in the land, and the wives could not be considered to have elected to take the lands, as they were *femes covert*. Burgin v. Chenault, 9 B. Mon. 285.

The assent of an executor to a devise of a life estate *ipso facto* enures to vest the estate in remainder. Finley v. Hunter, 2 Strobb. Equ. 208.

(b) In the Revised Statutes of Maine and New Hampshire, *sanity* is the only qualification expressly mentioned.

(c) Formerly otherwise. Fitch v. Brainerd, 2 Day, 163. In most of the States, the disability of a *feme covert* is implied.

(d) In Massachusetts, a wife, if of age, may devise property held in her own right, and separate from that of her husband; provided his interests therein shall not be affected, and

27. A *feme covert* may appoint uses, under a power reserved before marriage, and in this way may even devise to the husband. Such appointment is held to be valid in *equity*, but equity decrees a conveyance of the legal title by the heir.(1)(a)

28. It has been said, referring to the will of a *joint tenant*, that "there cannot be a *joint will*." But this principle does not affect the validity of a will made by a husband of his own land, in which the wife joins.(2)

29. A *feme covert* cannot validly devise, even with consent of the husband. The objection to such devise, is not a want of judgment, but of free agency. She may dispose of her chattels with the husband's consent, because they are in fact his, as they vest in him upon her death; while her real estate descends to her heirs.(3)

30. The other disabilities mentioned in the statute are *idiocy* and *non-sane memory*.(b)

31. In Virginia, the will of a *blind* man has been allowed. So, in Georgia, it is not indispensably necessary to the validity of a will executed by a blind man, or one who is unable to read or write, that it should be read over to him, in presence of the subscribing witness, previous to its execution. It is sufficient that he knows that it is his will. So, neither extreme old age, nor being deaf and dumb, is an absolute disqualification to make a will.(4)

32. The removal of a disability, which existed at the making of a devise, does not render it valid. Thus the declaration of an infant

(1) *Peacock v. Monk*, 2 Ves. 190; *Bramhall v. Hall*, Ambl. 467; *Rippon v. Dawding*, 565; *Rich v. Beaumont*, 6 Bro. Parl. 156; *Hodsdon v. Lloyd*, 2 Bro. 534; *Barnes v. Irwin*, 2 Dall. 199; *White v. Hart*, 1 Yeates, 221; *Sergeson v. Sealey*, 2 Atk. 412; *Parkes v. White*, 11 Ves. 222; *Bradish v. Gibbs*, 3 John. Ch. 523; *Park & J.* 466-7; *Holman v. Perry*, 4 Met. 492.

(2) *Darlington v. Pulteney*, Cowp. 260; *Rogers, &c.*, 2 Fairf. 303.

(3) *Marston v. Norton*, 5 N. H. 205. (See *Hood v. Archer*, 1 M'Cord, 225, 477.)

(4) *Boyd v. Cook*, 3 Leigh, 32; *Clifton v. Murray*, 7 Geo. 564; *Potts v. House*, 6 Geo. 324.

that he indorse upon the will his consent (if competent to act.) She may revoke the will without his consent. Mass. Stat. 1842, 231.

The will of a married woman, under the Massachusetts Statute of 1842, c. 74, is not valid, unless the assent of her husband be given thereto in writing, and indorsed thereon, during her lifetime. *Smith v. Sweet*, 1 Cush. 470.

The Massachusetts Statute of 1845, c. 208, does not extend or enlarge the power of a married woman to make a will. *Beach v. Manchester*, 2 Cush. 72.

The act, of 1842, c. 74, does not enable a married woman to make a devise of her real estate to her husband. [WILDE and DEWEY, JJ., dissenting.] *Morse v. Thompson*, 4 Cush. 562. But see Stat. 1850, c. 200.

In New York, a married woman may dispose of her separate estate, that is, one that she has such dominion over as to exclude the marital rights of the husband, by an instrument in writing, purporting to be her last will and testament. *American, &c. v. Wadhams*, 10 Barb. 597.

In all cases of wills by *femes covert*, such an instrument is not in fact a will, but a writing in the nature of a will, in virtue of the power reserved to the *feme covert*; and whoever takes anything under the same, takes by virtue of the execution of the power, and by the power coupled with the writing. *Ib.*

In New York the *jus disponendi* is incident to the separate property of a married woman, and she may give it to whom she pleases, and equity will sanction and enforce the disposition. *Ib.*

(a) In North Carolina, equity alone has jurisdiction of such will. *Newlin v. Freeman*, 1 Ired. 514.

(b) In Maryland, a statute of wills (1798, ch. 101,) requires that a testator, in order that the will may be valid, be "capable of executing a valid deed or contract." This, therefore, is the test of testamentary capacity. *Davis v. Calvert*, 5 Gill & J. 269.

devisor, made after coming of age, before witnesses, that his will shall stand, does not make it good. So the will of a married woman is void, though she survive her husband, even in equity. So the restoration of one *non compos* to his right mind does not make good his devise.(1)

33. All natural persons, *in esse* at the time when a will is made, and who are capable of purchasing, may be *devisees*. So it is now settled, though formerly doubted, that an infant *in ventre matris* may be a devisee. And even an unborn illegitimate child may take by devise, if the mother is sufficiently described.(2) (But see s. 37.)

34. Devise to A and his assigns for life, remainder to the use of all and every such child or children of A as should be living at his decease. Held, a child born seven months after A's decease should take in common with his other children, such being the evident intention, and this child being *alive* at A's decease.(3)

35. A *feme covert* may take by devise, even from her husband; because this does not take effect till after his death, which dissolves the marriage.(4)

36. It is said, *an alien* may take by devise, though it is doubtful for whose benefit. In New York, by statute, a devise to one who is an alien at the testator's death has been held void. In South Carolina, an alien devisee holds till *office found*. So, in Massachusetts, an alien may take by devise.(5)(a)

37. A *bastard* may be a devisee, after gaining a name by reputation, but not before. Hence a devise to him *in ventre matris* is void.(6)(b) (But see s. 33.)

38. A devise may be made to a *person uncertain*, as, for instance, to such of the daughters of A, as shall marry a person named B. So, also, by way of remainder or executory devise, to one not in being at the making of the will—as, to the first son of A, who then has none.(7)

39. St. 34 and 35 Hen. VIII, ch. 5, s. 14, expressly disables *corporations* from taking by devise, upon the principles of the law against mortmain. Charitable devises constitute an exception to this rule, as will be seen hereafter.(8)

40. In New York, a devise to a corporation is void, unless expressly authorized to take lands. And the rule applies to any estate or interest in real property, descendible to heirs.(9)

(1) Brunker *v.* Cook, 11 Mod. 123; Hawe *v.* Burton, Comb. 84; Arthur *v.* Bokenham, 11 Mod. 157; Combes *v.* Spender, 2 Vern. 475; Girard *v.* City, &c., 4 Rawle, 336.

(2) 6 Cruise, 15; Hall *v.* Hancock, 15 Pick. 255; Swift *v.* Duffield, 5 S. & R. 38. See *M'Knight v. Read*, 1 Whart. 213; Pratt *v.* Flamer, 5 Har. & J. 10.

(3) Doe *v.* Clarke, 2 H. Bl. 399.

(4) Lit. 168; Co. Lit. 112 a.

(5) Knight *v.* Duplessis, 2 Ves. 362; 2 N.

Y. Rev. St. 57; Vaux *v.* Nesbit, 1 M'Cord Cha. 352; Hart *v.* Hart, 2 Des. 58; Fox *v.* Southack, 12 Mass. 143. See Gilb. on Dev. 15; Collingwood *v.* Pace, 1 Lev. 59; 1 Keb. 174; Brown's P. C. 91.

(6) Co. Lit. 3 b; Metham *v.* Devon, 1 P. Wms. 529.

(7) Bate *v.* Norton, T. Raym. 82.

(8) 4 Kent, 506, 7.

(9) 2 N. Y. Rev. St. 57; Wright *v.* Trustees, &c., 1 Hoffm. 225.

(a) See *Alien, Descent*, for important changes in the law, relating to the right of aliens to hold real estate.

(b) Devise to the wife of the testator, and after her death to "her heirs by consanguinity," except a sister. At the making of the will the wife was pregnant, but the testator was ignorant of it. Soon after his death, the wife married again, after which her child by the testator was born, and died in six months. Held, being *in esse, in ventre matris*, the child took the remainder as heir of the wife. *Watkins v. Flora*, 8 Ired. 374.

41. In Maryland, a devise to a religious society, without leave of the legislature, is void.(1)(a)

42. In Ohio, the law against mortmain is not adopted. The capacity of a corporation to hold lands depends on its charter.(2)

43. In Connecticut, it is said, corporations may be devisees, but not mere voluntary associations.(3)(b)

44. Devise to *the yearly meeting of Quakers*, in trust for the school in P., to them, *the said people called Quakers, and their successors* in the same faith, forever. Held, the individuals composing the yearly meeting at the testator's death could not take; nor the meeting itself, as a voluntary association. Nor could it take in trust, though incorporated, unless explicitly authorized by statute.(4)

45. In Massachusetts, *towns and parishes* may acquire and hold property for the use of the objects and purposes of those institutions. Thus the latter may hold lands devised to them for the support of schools.(5)

46. Devise to the inhabitants of the second parish in A, confining it only to the use of the inhabitants of said A. This parish included certain inhabitants of B. Held, the parish for this reason could not take; nor the inhabitants of A, collectively, not being a corporation, nor as tenants in common.(6)

47. Where a devise is made to certain officers of a corporation, capable of taking, and their successors, for the use of the corporation, the officers *de facto* may recover against one not claiming under the devisor,

(1) *Murphy v. Dallam*, 1 Bland, 529.

(2) *Walk* 340.

(3) *Dut* 93.

(4) *Greene v. Dennis*, 6 Conn. 293. See *Earle v. Wood*, 8 Cush 690.

(5) *First Parish, &c. v. Cole*, 3 Pick. 232.

(6) *Barker v. Wood*, 9 Mass. 419.

(a) In Pennsylvania, a devise to a religious association, unincorporated at the death of the testator, but subsequently incorporated, is valid. *Zimmerman v. Anders*, 6 Watts & S. 218. In Massachusetts, a bequest to a foreign corporation is valid. *Burbank v. Whitney*, 24 Pick. 146.

(b) In the same State, it is held, that a corporation may be effectually *described* in a devise, without being named. Where a devise was made to "the Missionary Society of Foreign Missions," in order to show that "the American Board of Commissioners for Foreign Missions" was intended, parol evidence is admissible, of the testator's religious views, that the latter society is incorporated, &c.; there being no society bearing the former name, and the case being, therefore, one of latent ambiguity. *Brewster v. McCall*, 15 Conn. 274. So, in case of a devise to "the American Tract Society," there being two associations of that name, parol evidence may be offered to show which was meant. *Ib.* But, under a devise to "the Foreign Mission School at Cornwall," upon proof that the American Board had established an unincorporated school there, which was discontinued before the testator's death, the devise lapses. *Ib.*

In Massachusetts, a parish, as well since as before the repeal of Statute 1789, c. 19, by Statute 1826, c. 143, is legally capable of taking and holding gifts, devises and bequests of real and personal property, for the purpose of maintaining and supporting schools. *White v. South Parish, &c.*, 13 Met. 506.

In 1829, A, B and C, and their associates, were "incorporated as a religious society and body politic and corporate, with all the powers, privileges and immunities, and subject to all the liabilities of parishes according to the constitution and laws of this Commonwealth;" and authorized "to hold and possess, by grant, gift, devise, or otherwise, real and personal estate, for the purpose of supporting public worship, and other parochial charges." Held, the act of incorporation placed the society on the same footing with all other parishes and religious societies not territorial, and the society had a legal capacity to take and hold real and personal property, given to it by a will, in which the testator directed that the property should "be applied for the benefit of schooling all the children belonging and residing in said parish." *Ib.*

and showing no title, though the corporation has become extinct, or forfeited the estate by a change in its powers or rules.(1)

48. In Vermont, an incorporated church or society cannot take by devise, nor a person in a name of office derived therefrom. But a church may take the use, &c., of land devised to trustees, and, if they decline or fail to execute the trust, the testator's heirs at law shall assume it, or new trustees be appointed.(2)

49. In connection with the inquiry *who may be devisees*, may be very properly stated an important rule of law, with regard to the terms and conditions upon which, alone, under certain circumstances, a devisee may avail himself of the devise.(a)

50. Where a will contains two devises, one of which the testator has power to make, and the other not, and the former is made in favor of one with whose rights or property the latter undertakes to interfere, it is the general rule, that the will shall be good for the whole, or void for the whole, and that such devisee cannot make claim under the valid devise, and at the same time dispute that which is void.(3) Lord Erskine says,(4) a person shall not claim an interest under an instrument, without giving full effect to it, as far as he can. Lord Alvanley says,(5) no man shall claim any benefit under a will without conforming, as far as he is able, and giving effect to everything contained in it. This principle has been called *a rule in equity*,(b) but, in the same case, which was a bill to redeem a mortgage, the court remarked, that the plaintiff could not set up *a legal or equitable claim* to the land.(6)

51. Devise to A, a daughter of the testator, of lands held in fee-simple, and to B, another daughter, of lands held in tail, being his whole estate. A cannot object to the invalidity of the latter devise, and at the same time claim under the former; there being an implied condition that there should be mutual releases.(7)

52. A, by marriage articles, agreed to settle lands to the use of himself and his wife for their lives, remainder to the use of the heirs of their bodies. He afterwards made a settlement varying from the articles; and, on the marriage of B, his son, settled other lands on him in the usual manner, and levied a fine of lands embraced in the articles to the use of himself in fee. By his will, A devised part of those lands to his daughters, and the rest of his estates to C, his grandson. Held,

(1) Rector, &c. v. Pelham, 9 Mass. 501.

(2) Stone v. Griffin, 3 Verm. 400.

(3) Morris v. Burrows, 2 Atk. 629; Boughton v. Boughton, 2 Ves 14; Vaux v. Nesbit, 1 McCord's Cha. 360; Noys v. Mordaunt, 2 Vern. 582; Streatfield v. Streatfield, Cas. Temp. Tal. 183; Churchman v. Ireland, 1 Russ & Mý. 250; Brown v. Ricketts, 3 John. Cha. 553. See Salmon v. Stuyvesant, 16 Wend. 321; Haydon v. Ewing, 1 B. Monr.

114; Westcott v. Culliford, 3 Hare, 265; Weeks v. Patten, 6 Shepl. 42; Bacon v. Cosby, 3 Eng. L. & Equ. 186. See Egremont v. Lee, 10, 188; Miller v. Cotten, 5 Geo. 341.

(4) Thellusson v. Woodford, 13 Ves. 209.

(5) Whistler v. Webster, 2 Ves. 370.

(6) Hyde v. Baldwin, 17 Pick. 303.

(7) Noys v. Mordaunt, 2 Vern. 581; Bor v. Bor, 3 Bro. Parl. 167; Doe v. Cavendish, 4 T. R. 741.

(a) Where the specific devisee is by law incapable of taking, the property, as in case of a devise which lapses by the death of the devisee, passes to the heir. Van Kleeck v. New York, &c., 20 Wend. 457.

(b) *A strong operation* of a court of equity. Blake v. Bunbury, 1 Ves. jr. 523. In case of a clear intention to that effect, the rule is applied even to infants and *femes covert*. Robertson v. Stevens, 1 Ired. Equ. 247.

The accidental omission of one of several tracts of land, intended to be devised, will not destroy the will, though the testator designed an equal distribution of his estate, which this accident disturbs, and though the omission was not discovered by the testator. Hearn v. Ross, 4 Harring. 46.

C must elect whether to take by the will or the articles, though having the legal title to the lands embraced in the latter.(1)

53. The principle of election does not apply, where a will undertakes to dispose both of real estate and personal, and is void as to the former, for want of due execution or for incapacity of the testator. In such case, there is in fact no disposition of the land, but the will as to that is void.(2)

54. Devise, defectively executed, of real and personal estate, for life, to the widow of the testator. Held, she might take the personal estate, and one-third of the real, accounting for the rents and profits while she held the whole.(3)

55. But it has been usually held in England, that the principle of election does apply, where an heir, claiming under the will, is also entitled to land which the will undertakes to dispose of, but which does not pass, by reason of its being purchased after the making of the will. Nor is it material to inquire what the testator would have done, had he been aware of the true state of the circumstances and the extent of his power. Nothing can be more dangerous, than to speculate upon what he would have done if he had known one thing or another. It is enough to say, he had such intention. Whether he thought he had the right, or, knowing otherwise, intended by an arbitrary execution of power to exceed it, no person taking under the will shall disappoint it.(4)

56. A testator devised lands to trustees, upon trust to accumulate the rents for a certain time, and directed, that if he should contract to purchase lands and die before a conveyance, the lands should be conveyed to the trustees upon the trusts of the will. He also made a devise to his son and heir. After the execution of the will, the testator purchased lands, and died without republishing it. The heir brings a bill in equity, praying for the purchase of lands with the personal estate, and that the trustees may stand seized to his use. Held, he was bound to make an election. The testator, intending to apply his personal estate to the purchase of lands, was not aware of the distinction between real and personal estate, but supposed the trustees would be legally seized of the lands to be purchased to the uses of the will. Under this impression, he made the devise to his heir, supposing that the whole property and arrangement were under his control. The case is not like that of an infant, (as in *Hearle v. Greenbank*,) for here the testator had a clear right to devise, but the devise fails through his ignorance of the necessity of a subsequent will. So in *Noys v. Mordaunt*, although the testator's intention was clear, yet the law regarded the proof by three witnesses as so important a part of the transaction, that an instrument not thus proved had no legal existence, and the law would not notice it, or allow it to be read. These are the only instances in which the principle has been limited.(5) It is clearly applicable to an heir at law. Thus, where the testator devises to his heir an estate which he would inherit but for such devise, and to a third person another estate belonging to the heir himself, it is said, although the heir might be held to take by descent, his better title, yet the devise shows that the testator was aware of his power to devise the estate, and a condition is therefore implied.(6)

(1) *Streatfield v. Streatfield*, Forr. 176.

(2) *Hearle v. Greenbank*, 6 Cruise, 17-18.

(3) *Snelgrove v. Snelgrove*, 4 Dess. 274.

(4) *Thellusson v. Woodford*, 13 Ves. 209.

(5) *Thellusson v. Woodford*, 13 Ves. 209; 1 Dow, 249.

(6) See *Gilb. Eq. R.* 15.

57. A late case in England seems to hold a similar doctrine.

58. Devise of "all and singular my estate and effects, &c., real and personal, which I shall die possessed of," &c. There was also a devise to the heir at law. Held, he could not avail himself of this devise, without giving effect to the former clause, in relation to after-purchased lands.(1)

59. In a late case in Pennsylvania, the English cases upon this subject were elaborately reviewed, and it was held, that the principle of election does not apply in the case of lands purchased after the will was made, because this principle is founded upon the consideration, that the testator has in view the property which he attempts to dispose of, and distinctly designs the other as a substitute for it, in favor of the heir, and in the case of after-purchased lands no such intent can exist. A distinction is also taken between the *implied* condition of fairness and equity, that a devisee shall not accept a gift, and do anything seemingly in opposition to the intention or wish of the testator, and an express condition, a violation of which would in every case alike forfeit the devise. It is further remarked, that the principle in question has never been extended beyond the point of enforcing the devise to a third person as against the heir. It has never gone so far as to cause a forfeiture of the whole property given to the heir. Equity proceeds upon the principle of *compensation*, and for this purpose *sequesters* the estate devised to the heir. But its office is not to declare a *forfeiture*, but rather to save from it.(2)

59 a. In the same State, where a testator devises two tracts of land, of different value, to different persons, and the devisee of the tract of inferior value elects to take the other by a paramount title; the devisee of the latter tract may recover the former in ejectment, and need not resort to equity for compensation.(3)

59 b. So where a *feme covert*, who is tenant in remainder, dependant upon an estate tail, accepts a legacy under the will of her father, who, acting on the validity of a deed of partition of the estate tail, and asserting a several estate in himself by virtue of such deed, devised the same in fee to his sons; she is barred by her election; and, inasmuch as the will stipulated for a general release by her, the presumption is, after the lapse of over one hundred years, that the legacy was paid to her, and that she executed the release. The doctrine of election applies to persons under disabilities, and to interests immediate, or remote and contingent, of value, or not of value.(4)

59 c. In Vermont, a testator devised certain land of his wife, in which he had only an estate by the curtesy, to his son; and to his wife, for life, the use of one-third of his real estate, and the right of occupying part of his dwelling-house, and also certain personal property; and the residue of his property, real and personal, to all his children, including his son, who were also the heirs at law of the wife. The will was proved without opposition; and the widow, until her death, and all the children, continued to live together on the estate, without any division of the property, or setting off dower; and the children continued to live together until long after her death. Held, the heirs

(1) Churchman v. Ireland, 1 Russ. & My. 250. But see Back v. Kett, Jac. 534.

(2) Philadelphia v. Davis, 1 Whart. 490.

(3) Lewis v. Lewis, 1 Harr. 79.

(4) Tieruan v. Roland, 3 Harris, 429.

at law of the widow were not estopped, to deny the validity of the devise of her land.(1)

59 *d.* In Virginia, devisees, having an equitable interest in land sold by the testator, may assert it, though taking under the will; such interest not being devised.(2)

60. Chancellor Kent is of opinion, that an heir cannot claim under the will without allowing a devise of after-purchased lands.(3)

61. The principle above referred to has been remotely recognized by a statute of Connecticut, which provides, that where a devise is avoided for informal execution of the will, which also contains a valid legacy to an heir; the latter is an *advancement*.(4)(a)

62. With regard to *the kind of property* which may be devised, a devise applies only to *real estate*; the interests in which, enumerated by the statute of wills, are "manors, lands, tenements, rents, or other hereditaments, in possession, reversion, or remainder."

63. The general rule upon the subject is, that an estate which cannot at common law be *conveyed*, by act executed in his life by advice of counsel learned in the law, cannot be *devised* by the will of a man, who is intended by law to be *inops consilii*.(5)

64. Determinable or base fees are devisable, as well as fees simple. So an estate *pour autre vie*, under the term *lands*.(6)

65. A term for years is devisable, independently of the statute, being personal estate. The consent of the executor is necessary to complete the devisee's title; but, if the term be devised to A for life, remainder to B in fee, an assent to the former devise is sufficient for both.(7)

66. Trusts, like uses at common law, are devisable; and the devise operates as a direction to the trustee to convey the estate to the devisee.(8)

(1) *Fitts v. Cook*, 5 Cush. 596.

(2) *Norman v. Cunningham*, 5 Gratt. 63.

(3) 4 Kent, 510, n.

(4) Con. St. 211-12.

(5) *Corbet's case*, 1 Rep. 85 b.

(6) *Cowper v. Frankline*, 3 Bulstr. 184.

(7) *Lampet's case*, 10 Rep. 47 b.

(8) *Wagstaff v. Wagstaff*, 2 P. Wms 258.

As to the devise of an equitable estate tail, see *Trash v. Wood*, 4 My. & C. 324.

(a) The following case in South Carolina, relating chiefly to personal property, recognizes the rule stated in the text:

A directed his whole estate to be kept together, until its income should be sufficient to pay his debts and legacies. He also devised as follows: to his daughter B, who with her family had resided with the testator, a certain house lot where he had lived; to the children of his daughter C, certain bonds and other securities against their father; a certain estate, which he had purchased from his son-in-law, the husband of B, in trust for her use, he devised to be held according to the trust in his will and not in the deed to him; to four children of his deceased daughter D, one of whom died before the date of his will, he gave three thousand dollars each, the share of any one dying before he arrived at age, or day of marriage, to go to the survivors; certain property in slaves, which had come to the testator's wife by will, giving her a life estate with remainder to her children lawfully begotten, the testator included in the residuary clause to be divided among his two daughters, B and C. Held, that B and the children of C were entitled to the immediate possession of their devises, and that they were not to be kept with the rest of the estate for accumulating its income; that the trust estate which A had purchased from B's husband, came under the principles of election, and that the same principles applied to the estate devised to his wife, except that as there would be a difference in the amount of the two daughters, a part of the electing party's estate should be sequestered to equalize the estate of her co-legatee; and lastly that the children of D were entitled to twelve thousand dollars to be divided between them, as the share of the one dying before the date of the will did not lapse but went to the survivors. *Lawton v. Hunt*, 4 Strobb. Eq. 1.

67. Where one has contracted for the purchase of lands, he may devise them in equity, having an equitable seizin. Nor does it make any difference, that a future day is fixed for the execution of the bargain on both sides, and that the will is made before this day arrives. So, although the agreement is merely parol, if by an admission or by part performance it becomes binding on the parties, the lands will pass by a will of the purchaser, but not otherwise.(1)(a) (See ch. 32.)

68. It is said, a mortgage is devisable after breach of condition, not before, being a mere naked condition. So an equity of redemption is devisable.(2)

69. A rent is devisable.(3)

70. *Franchises*, which are not of a certain yearly value, are not devisable; such as the right to waifs, estrays, &c. But franchises of a certain value are devisable, unless restricted to the grantee and his heirs. Also those of the former class, if annexed to something of certain value—as a manor—which is devised, *with the appurtenances*.(4)

71. It was formerly supposed that contingent interests in land are not devisable. But the law seems to be now settled otherwise. (See Vol. I, p. 556; *Infra*, sec. 81, n.) Lord Mansfield remarked, that all contingent, springing and executory uses, where the person who was to take was certain, so that the same might be descendible, were devisable.(b) Lord Northington, alluding to the same principle, said, the point is settled, and ought not to be shaken. It is a liberal and right determination. Lord Kenyon remarked, that the clause in the statute of wills, enabling any person “having manors, lands,” &c., to devise them, meant “having *any interest* in lands;”(c) and he distinguished between a contingent interest and the *mere possibility or hope of succession* of an heir.(5)

72. Thus, where A, tenant for life, and B, having a remainder in tail, joined in a common recovery for the purpose of barring the entail, and, after the execution of a deed, declaring the uses to A for life and B in fee, but before the return of the writ of entry sued out to complete the proceedings, B made his will, devising the lands; held, B's interest passed by the devise.(6)

73. Devise in trust for A; and, if he die without issue, an infant, then devise to B in fee. B dies, living A, having devised all his estate, in possession, remainder, &c. A dies, under age, and without issue. Held, the devise of B was good.(7)

(1) 1 Cha. Cas. 39; *Ackerley v. Vernon*, 9 Mod. 78; *Greenhill v. Greenhill*, Prec. in Cha. 320; *Livingston v. Newkirk*, 3 John. Cha. 316; *Irwin v. Hamilton*, 6 S. & R. 208; *Hundley v. Lyons*, 5 Munf. 342; *Potter v. Potter*, 1 Ves. 437; *Smith v. Jones*, 4 Ohio, 121; *Langford v. Pitt*, 2 P. Wms. 629. (See 2 Ohio, 386.)

(2) 2 Cha. Cas. 8; *How v. Vignerres*, 1 Cha. R. 18; *Phillips v. Hele*, Ib. 101.

(3) Co. Lit. 111 a, n. 5.

(4) 6 Cruise, 26; 3 Rep. 32 b.

(5) *Fearne*, 537; *Selwin v. Selwin*, 1 Bl. R. 222, 251; 2 Burr. 1131; *Ree v. Jones*, 1 H. Bl. 33; *Moore v. Hawkins*, 2 Eden, 342; *Jones v. Roe*, 3 T. R. 88; *Perry v. Phelps*, 1 Ves. jun. 251; 4 Kent, 510; *Cruger v. Heyward*, 2 Desaus. 422.

(6) *Selwin v. Selwin*, 1 Bl. R. 222, 251.

(7) *Moor v. Hawkins*, 1 H. Bl. 33.

(a) This last point has been held questionable in South Carolina. *Thomson v. Scott*, 1 McCord Cha. 32.

(b) This last test was also adopted by Judge Buller. *Jones v. Roe*, 3 T. R. 95-6.

(c) Statute 34 and 35 Hen. VIII, which is explanatory of the statute of wills, uses the words, “a sole estate or interest.”

74. Devise to A, till some one of his younger sons comes of age; if no one of them, but only one son of A should come of age, then till such son comes of age. When any of the younger sons come of age, then to such son in fee. The testator died, leaving B and C, the sons of A. B having died under age, C, in the lifetime of A, only made a will, devising all the estate in possession, &c., that he should die interested in, (using the most comprehensive terms.) Held, even if C had only a springing, contingent, executory use, it was still devisable.(1)

75. The right of entry remaining in a reversioner, &c., after the wrongful conveyance of a particular tenant, (and, it seems, any other mere right of entry or condition, disconnected from a reversion, &c.,) is not devisable; not being assignable at common law, and not falling within the words of the Statute 32 Henry VIII, "manors, lands, tenements," &c., or those of Statutes 34 and 35 Henry VIII, "an estate or interest in fee, &c., in possession, reversion, or remainder."(a) It is said, whatever mischief or hardship might arise from this rule, it could be remedied only by positive law; and the propriety of applying such a remedy, whereby the same rights of entry and action, which belong to the heir, might be extended to the devisee, was a question particularly fit for the consideration of the legislature.(2)

76. Settlement upon the survivor of A, B and C. Neither of these parties can devise his interest, it being a mere possibility.(3)

77. A disseisee may perhaps devise his right and interest to the disseisor by name, by way of release recognizing his possession; but not to any other person.(4)

78. A conveyance obtained by fraud and imposition, acknowledged and recorded, but under which no possession is taken till after the grantor's death, is not a disseizin which disables him to devise the land.(5)

79. So, after making a deed, which is not recorded, and under which no possession is taken, the grantor may make a valid devise of the land.(6)

80. In New York, it has been held that a right of entry is devisable; and now, by statute, every thing descendible may also be devised.(7) So in Massachusetts, and, it is said, in Pennsylvania and Virginia, rights of entry are devisable.(8)(b)

(1) *Roe v. Jones*, 1 H. Bl. 30; *Jones v. Roe*, 3 T. R. 88; *Perry v. Phelps*, 1 Ves. jun. 251.

(2) *Jones v. Roe*, 3 T. R. 88; 4 Kent, 510; *Goodright v. Forrester*, 6 Cruise, 31; *Corbet's case*, 1 Rep. 85 b; *Butler's case*, 3 Rep. 32 a; *Lord Mountjoy*, Godb. 17; 1 Taun. 578. See *Hyer v. Shobe*, 2 Munf. 200.

(3) *Doe v. Tomkinson*, 2 M. & S. 165.

(4) *Poor v. Robinson*, 10 Mass. 136.

(5) *Smithwick v. Jordan*, 15 Mass. 113.

(6) *Whittemore v. Bean*, 6 N. H. 47.

(7) *Jackson v. Varick*, 7 Cow. 238; 2 Wend. 166; 2 N. Y. Rev. St. 57; *Mass. Rev. St.* 416.

(8) 4 Kent. 512; *Watts v. Cole*, 2 Leigh, 664; 3 Lom. 20.

(a) But see St. 7 Wm. IV, and 1 Vict. ch. 26. A right of re-entry, for breach of condition contained in a grant in fee, reserving rent, does not pass by a devise of the premises as land. *Herrington v. Budd*, 5 Denio, 321.

(b) In Ohio, New Hampshire and Vermont, also, the terms used, to express the kinds of property which may be devised, are peculiarly broad and comprehensive. Ohio St. 242; 1 Verm. L. 336; N. H. Rev. St. 311. In Maine, property of which the deviser is lawfully seized. Rev. St. 375. But another section authorizes the devising of land upon which the testator has a right of entry; though he be disseized before or after the will is made.

A mere wrong doer, who has only a color of title, cannot pass any estate by will. *Smith v. Bryan*, 12 Ired. 11.

81. A devise, whenever allowed by law previous to the statute of wills, was regarded as an *appointment to uses*, and therefore limited in its operation to such lands as the testator had *at the time of making the will*. The same principle was afterwards adopted in construing the statute of wills; founded upon the use of the word *having*,—"every person *having* lands," &c.) Upon this ground, in pleading a will, it is always averred that the testator was seized in fee; and, being so seized, made his will. Nor does it make any difference, that the will by its terms intends and purports to devise whatever lands the testator shall be seized of *at his decease*. In an early case,(1) it is said to have been determined in 39 Henry VI, 18, that after-purchased land may pass by a devise, because the will shows an intention to purchase it, and the will would otherwise be void. But this remark has since been said(2) to have been made by *counsel*, not by the court; and the rule is perfectly well settled the other way.(3)(a)

82. Upon this principle, where land is held in joint tenancy, (in which case, as has been seen, Vol. I, p. 583, it is not devisable by one of the tenants,) and, after a devise, by one of the owners, of his share, partition is made, the devise is still void. The statute of wills expressly mentions a *sole* estate, or one in co-parcenary or in common.(4)

83. The above rule does not depend upon intention, nor upon the restrictive words of the English statutes; for it has been held equally applicable to devises *by custom*, and not by statute. It is analogous to the rule which governs in a covenant to stand seized to uses, which, though construed by the *intention*, cannot operate upon *future* property.(5)

84. In some instances, where the interest purchased after the making of the will is merely incident to or involved in an estate previously owned, the former will pass by devise. As in England, where a manor is devised, and a tenancy subsequently escheats, or a copyhold is purchased—more especially if the manor is devised *with the appurtenances*. So land contracted for may be devised in equity. And where, after a contract for the purchase of land, and part of the price paid, the purchaser devises it, then pays the balance and takes a deed; this is a revocation only at law, but not in equity. (See ch. 93.) But ground-rents, reserved in a conveyance subsequent to the making of the will, will not pass thereby. So, where a testator, at the time of making his will, before the Revised Statutes (of Massachusetts) took effect, held land in mortgage, afterwards devised all his real estate, and then foreclosed; held, the mortgaged land did not pass.(6)

(1) *Brelt v. Rigdon*, Plow. 344.

(2) *Bunker v. Coke*, 11 Mod. 106, 122; Fitzg. 225.

(3) *Arthur v. Bokenham*, 11 Mod. 163; Fitzg. 233; *Hogan v. Jackson*, Cowp. 305; 3 Rep. 30 b; *Bunker v. Coke*, 11 Mod. 106, 122; 1 Salk. 237; *Brewster v. M'Call*, 15 Conn. 274; *Meador v. Sorsby*, 2 Alab. (N. S.) 712; *Ross v. Ross*, 12 B. Mon. 437.

(4) Lit. 287; Co. Lit. 185 a; 3 Rep. 25;

Butler v. Barker, Poph. 87; *Swift v. Roberts*, 3 Burr, 1488; 1 Bl. R. 476.

(5) *Girard v. City, &c.*, 4 Rawle, 335; *Yelverton v. Yelverton*, Cro. Eliz. 401.

(6) *Bunter v. Coke*, 1 Salk. 238; 11 Mod. 129; *Roe v. Wegg*, 6 T. R. 708; *Livingston v. Newkirk*, 3 John. Cha. 312; *Clapper v. House*, 6 Paige, 149; *Mullock v. Souder*, 5 Watts & S. 198; *Brigham v. Winchester*, 1 Met. 390.

(a) But by St. 1 Vict. ch. 26, every thing may be devised which would otherwise go to the heir, including contingent, executory and future interests, rights of entry, and property acquired after the making of the will.

Under this statute, a devise of "all my estate and effects" passes after-purchased lands. *Stokes v. Salomons*, 4 Eng. L. & Eq. 133.

85. A term for years will pass by will, though subsequently purchased, being a chattel real; and the will operating in such case as a testament, not as a devise.(1)

86. On the other hand, lands will not pass by devise, though the testator be seized of them at the making of the will, unless he is also seized at his death. Thus, a devise is defeated by a subsequent dis-seizin of the testator; but, if he re-enter, it becomes again valid. So, a conveyance revokes a prior will.(2)

87. Inasmuch as after-purchased lands cannot pass by a devise, no regard will be paid to the manifest intention of the testator to devise them, in *marshalling* the estate to be sold for payment of debts. Thus, where the testator ordered that his debts should be paid, devised specific lands to A, and all the residue of which he should *die seized* to B, and acquired lands after making the will; held, the executor should sell for payment of debts, first the lands devised, but not specifically, and then the descended lands, intended to be devised.(3)(a)

87 a. The principles above stated have been changed by statute in many of the States. And it has been held, that where the law of a State, in which a will is made, does not permit a devise of after-acquired property; but the land in question lies in a State where such disposition is allowed; the land will pass, if included in the terms of the will.(4)

88. In Virginia, by statute, a devise may embrace after-purchased lands, but not unless there is a clear intention to that effect.(5)

89. In Pennsylvania, in a late case, it was held, upon an elaborate review of the course of legislation relating to wills, that the English law is there in force. The words of the statute are, "wills so proved shall be good, &c., for the *granting, conveying, and assuring* lands, &c., as well as goods," &c.; and it was contended that *future* lands as well as goods, therefore, might be disposed of by will. But the court decided, that a different inference was to be drawn from the words *granting, &c.*, which were terms of *conveyance*. (A subsequent statute provides otherwise.)(6)(b)

90. In New York, Pennsylvania,(c) Massachusetts,(c) New Hampshire,(c) Ohio,(c) Maine,(c) Vermont and Kentucky, after-purchased lands

(1) *Wind v. Jekyl*, 1 P. Wms. 575; *Carte v. Carte*, 3 Atk. 176. | *bott v. Voules*, 6 Sim. 40; *Lock v. Foote*, 5, 618; *Hall v. Bray*, Cox, 212.

(2) *Holt*, 748; *Roe v. Griffiths*, 4 Burr. | (3) *Hays v. Jackson*, 6 Mass. 149.

1961; *Att'y. &c. v. Vigor*, 8 Ves. 282; *Bro.* | (4) *Wynne v. Wynne*, 23 Miss. 251.

Abr. Devise, pl. 15; 1 *Rolle's Abr.* 615; *Teb-* | (5) *Smith v. Edrington*, 8 Cranch, 66.

(6) *Girard v. Philadelphia*, 4 Rawle, 323.

(a) But where the will directs an appropriation of certain lands to the payment of debts, which the testator afterwards sells, and purchases others; on application of the legatee of the personal property, the court will order a sale of the after-purchased lands for the purpose above-named. *Lee, &c.*, 18 Pick. 285. In Kentucky, it is held, that a general charge of debts upon lands does not extend to after-purchased lands. *Warner v. Swearingen*, 6 Dana, 198.

(b) But this does not apply to a will executed prior to its passage. *Mullock v. Souder*, 5 Watts & S. 198.

(c) In Massachusetts, Maine, New Hampshire and Ohio, if there is a plain or clear intent to pass them; in Pennsylvania, unless there is a contrary intent. See *Brigham v. Winchester*, 1 Met. 390. In Kentucky, a general disposition of *real estate* is not sufficient proof of such intention. *Warner v. Swearingen*, 6 Dana, 198.

In Massachusetts, the act applies to wills made before it took effect. *Cushing v. Aylwin*, 12 Met. 169; *Pray v. Waterston*, *Id.* 262. And if the will says "all my property, including"

pass by devise, if it is so intended. In South Carolina, the words of the statute are "any *right* or title;" and it has been contended, that the former word embraces some interests, which are not devisable by the English law. In Connecticut, by an act of 1831, after-purchased lands pass by devise. But the act has been held inapplicable to a will made before its passage, though the testator died after. In North Carolina, contingent interests, rights of entry, and after-purchased lands, will pass by devise. No act, subsequent to the making of a will, except a revocation, shall prevent its operating upon such property as the testator has at his death. The will is to speak as if made at that time.(1)(a)

(1) 2 N. Y. Rev. St. 57; 4 Kent, 512; Turpin v. Turpin, 1 Wash. 75; Hyer v. Shobe, 2 Munf. 200; Watts v. Cole, 2 Leigh, 664; Verm. Rev. St. 254; Swan, 999; N. H. Rev. St. 311; Smith v. Jones, 4 Ohio, 115; Thomson v. Scott, 1 McCord's Cha. 41; Mass. Rev. St. 417; Park & J. 467; Brewster v. McCall, 15 Conn. 274; N. C. St. 1844-5, 125-6; Maine Rev. St. 376.

a certain specific estate; still, after-purchased land will pass, such being the apparent intent. *Ib.*

Under the Rev. Sts. c. 62, sec. 3, which provide for the passing, by will, of after-purchased real estate, "if such shall clearly and manifestly appear, by the will, to have been the intention of the testator," it is not necessary that the intention should be manifested by an express declaration, if it can be inferred from the several provisions of the will; and the true question seems to be, whether the testator intended to die testate as to all the property which he might leave, or whether he was content to die intestate as to a part, and leave it to be distributed according to law. *Brimmer v. Sohler*, 1 Cush. 118.

Wherever there is a devise of the whole estate, or of all the residue of the estate, of a testator, there being both real and personal estate upon which the will may operate, an intention to give after-acquired real estate may perhaps be justly inferred, unless there be some indication of a different intention to be found in the will. *Ib.*

It is sufficient if it appear, by the whole scheme and tenor of the will, that the testator intended to make a full and entire disposition of his whole property. *Winchester v. Forster*, 3 Cush. 366.

In Kentucky, by his will, the testator gave all his estate, real and personal, to his wife for life, and after her death to A. After the making of the will, he acquired a slave and a tract of land. Held, the slave passed by the will, but the land did not; no intention to pass it being expressed or necessarily implied. *Marshall v. Porter*, 10 B. Mon. 1.

(a) The statute, making devises to operate on such real estate as the testator may have had at the time of his death, was prospective, merely, and did not extend to wills made and published before that act went into operation, though the testator did not die until afterwards, unless there had been a republication of the will after the act went into operation. *Williams v. Davis*, 12 Ired. 21; *Butler v. Spreight*, 9, 288.

In Mississippi, a devise of "all the balance of the testator's property, both real and personal, to the exclusion of all others," clearly shows the intention of the testator to dispose of all real estate of which he should die seized. *Wynne v. Wynne*, 23 Miss. 251.

CHAPTER XCI.

FORMALITIES OF A DEVISE.

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| 1. Devise must be in writing—statute of frauds.
6. Sealing, whether necessary.
7. Signing, what is.
12. Attestation, general principles in relation to.
24. Acknowledgment before the witnesses sufficient.
27. <i>Marks of witnesses.</i>
28. Testator blind.
29. Attestation of a will written upon different sheets.
32. <i>In presence of the testator</i> , what is—form of attestation.
38. Witnesses need not attest at same time. | 39. Will and codicil, what attestation sufficient.
40. Different parts of one will.
47. <i>Credible or competent</i> witnesses, what.
63. <i>Publication</i> of will.
65. Power reserved to make a future unattested will.
75. What property requires formal execution of a will—charge of legacy upon lands—trusts—terms, &c.
78. Will void as to lands, whether a good testament.
82. Devise must be according to <i>lex rei sita</i> .
83. Probate of a will, whether necessary and effectual. |
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1. BY the statute of frauds, (29 Cha. II, c. 3, s. 5,) it is provided, that all devises shall be in writing, signed by the party or by some other person in his presence, and by his express directions, and shall be attested and subscribed in his presence, by three or four credible witnesses.^(a) This statute is adopted or copied in most of the States.

2. It is said, a devise may be written upon paper or parchment, in any language, and in any character that is fair, legible and intelligible. So also sums of money may be expressed in figures. Thus where a will, in which legacies charged on lands were written in figures, was scarcely legible, it was referred to a master to ascertain, with the aid of skilful persons, what the legacies were.⁽¹⁾

3. It was said by Lord Mansfield, that the court would lean in support of a fair will, and not defeat it for a slip in form, where the meaning of the statute had been complied with. But an execution would not be aided, which the testator himself had left as incomplete, and failed to finish.^{(2)(b)}

4. A will may be written at several times, and on several unconnected sheets; though the latter, it seems, should be joined by a piece of tape, or otherwise.⁽³⁾

5. It is said, the statute required signing rather than sealing and delivery, which are requisite in deeds, because, at the time of its enactment, private seals as a mark of distinction had become disused. It has been also suggested, and even decided, that, sealing is of itself a

(1) *Masters v. Masters*, 1 P. Wms. 425.

(2) *Right v. Price*, Dougl. 241; *Dunlap v. Dunlap*, 4 Desaus. 313.

(3) *Lee v. Libb*, 1 Show. 66; *Pearson v.*

Wightman, 1 S. C. Con. 341; *Tonnele v. Hall*, 4 Comst. 140; *Wikoff, &c.*, 15 Penn. 281. (But see 6 Cruise, 45-6.)

(a) By late acts (Sta. 7 Wm. IV and 1 Vict. ch. 26,) the number of witnesses is reduced to two. See *Rigg v. Wilton*, 13 Illin. 15.

(b) A blank of about ten lines was left between the conclusion of a will and the signatures of the testator and witnesses. Held, the will was entitled to probate. *Anderson*, 1 Eng. Law and Eq. 634.

sufficient signing; *signum* meaning only a *mark* that it is a will. (a) But this was afterwards called a *strange doctrine*, for it would make it easy to forge a will, by merely forging three obscure names (of witnesses.) (1)

6. In Vermont and New Hampshire, (b) a will of lands must be sealed. In Massachusetts a seal is usual, but not necessary. (2)

7. Where the deviser writes his own name in any part of the will, this is a sufficient signing, for the statute does not direct in what part the will shall be signed. Thus, it is enough if the will begin, "I, A. B, make this, my last," &c. (Otherwise in New York, Arkansas, (c) and Ohio, and in Pennsylvania, unless prevented by *extremity of last sickness*. In Pennsylvania, by a late act, a will may be signed by the direction of the testator, or by his cross or mark.) (3)

8. But an actual signing is necessary, though the attestation clause states that the will was *signed, published and declared*. (4)

9. Where a will is signed, but in such a way that the testator regards the execution as incomplete, and designs to finish it by a further act; the signing is insufficient.

(1) Allen v. Hill, Gilb. R. 261; Lemayne v. Stanley, 3 Lev. 1; Warneford v. Warneford, 2 Stra. 764; Smith v. Evans, 1 Wils. 313; Grayson v. Atkinson, 2. Ves. 459; Ellis v. Smith, 1 Ves. jun. 13; Wright v. Wakeford, 17, 459.

(2) 3 Griff. 13; Avery v. Pixley, 4 Mass. 462; N. H. Rev. St. 311.

(3). Lemayne v. Stanley, 3 Lev. 1; Pearson v. Wightman, 1 Const. (S. C.) 343; Morrison v. Turnour, 18 Ves. 183; 2 N. Y. Rev. St. 63; Park & J. 467; Swan, 992; Ark. Rev. St. 764. See Dunlop v. Dunlop, Pa. Sup. C., Law. Rep. April, 1841, p. 446; Penns. Sts. 1848, 16.

(4) Blennerhasset v. Day, 2 Ball & B. 104.

(a) It is a sufficient signing, for the testator to make his mark, without proof of his inability to write. Baker v. Dewing, 8 Ad. & Ell. 94. Acc. Ray v. Hill, 3 Strobb. 297; Smith v. Dolby, 4 Harring. 350.

The name of the testator was written by one of the witnesses in her presence and at her request, without any design on her part to affix her mark till after the attestation. Held, a superfluous act. Rosser v. Franklin, 6 Gratt. 1. And it is immaterial, whether the mark is made before or after the subscription of the witnesses, the whole transaction being in law one continuous act. *Ib.*

A writing, purporting to be a will, and to be executed by A by a mark, which writing, with the names of all the persons whose names were subscribed as witnesses, and the name of A, were in the handwriting of B, one of the persons named as witnesses, was not admitted to probate, on proof that the signature of B was in her own handwriting, and that she was dead. Will of Jolly, 1 Halst. Ch. 456.

A testator's mark affixed to a will is not, at common law, his signature; nor is it, of itself, presumptive evidence of a direction to sign his name. Greenough v. Greenough, 1 Jones, 489.

The solicitor of the deceased, being aware of her infirm state of health, prepared the attestation clause, reciting that she had executed the will by making her mark. The deceased, however, wrote her initials in the presence of two witnesses, who duly attested and subscribed their names. Held, the will was well executed. Savory, 6 Eng. Law and Eq 583.

(b) So in Indiana, it seems. 3 Griff. 461. Since held, a will may be *revoked* by an instrument not sealed. Doe v. Pattison, 2 Blackf. 355. The ordinance relating to the North Western Territory is said to have required a seal, but the rule has been since abrogated. Piatt v. McCullough, 1 McL. 70.

(c) In this State, a third person may sign the will for the testator, if he also attest it, and state that it was done at the testator's request.

The statute of Missouri, requiring any person who subscribes the name of a testator to his will, at his request, to witness it, and state that fact, is *mandatory* and not *directory* merely; and, if it be not complied with, a will so signed is void. McGee v. Porter, 14 Mis. 611.

A will commenced in these words: "I, Samuel Adams." &c.; was wholly in the handwriting of the testator, but written at different times; contained the usual *testimonium* clause, and was not subscribed by the testator at the foot; but the testator produced the instrument in the presence of three witnesses, and declared it to be his will, and requested them to witness it, and they did attest it, in presence of the testator and of each other. Held, the testator thereby adopted the instrument, as it was then signed, as his will, and the will thereby became complete, as if the testator had originally written his name at the commencement, with the intent that it should serve as a signature to the will; and that it was a sufficient signing of the will. Adams v. Field, 21 Verm. 256.

10. A will was written on five sheets of paper, upon the last of which a seal was placed, and the form of attestation written. The will was then read to the testator before three witnesses, who subscribed, and he signed the two first sheets in their presence, and attempted to sign the third, but was unable. He said, "I cannot do it, but it is my will." The witnesses then left, being desired to come again. The three last sheets were never signed. Held, the testator did not intend the signing of the two sheets as a signing of the whole, and that the will therefore was not duly executed.(1)

11. A will was written upon three sides of one sheet of paper, and attested. The conclusion stated, that "the testator had signed his name to the two first sides, and put his hand and seal to the last." He actually had done the former, but not the latter. Held, the execution was decisive of his final determination, whatever he might previously have intended, and that the will was valid.(2)

11 a. A will was written on two sheets of paper, connected by the sense and dependence of the parts, and written with the same ink, but not fastened together, and only one sheet signed. The witnesses proved both sheets, as the will of the testator. Held, as the statute did not require the sheets to be fastened together, and there was no suspicion of unfairness, the will should stand.(3)

11 b. An instrument, propounded as a will, consisted of eight unfolded sheets or pieces of paper, securely attached together at the ends. The writing of the will commenced on the first, and was continued on the four succeeding sheets, where it closed with the usual attestation clause, and was subscribed by the testator and the witnesses. On one of the sheets following the signature was a map, not signed by the testator or witnesses. The testator owned houses and lots in the city of New York, which he disposed of to his widow and among his descendants. In the body of the will the lots were designated by numbers, with a reference to the map as follows: "Which said lots are designated on a certain map now on file in the office of the registrar of the city and county of New York, (a copy of which on a reduced scale is hereto annexed,) entitled map of property of," &c., (particularly describing the map on file.) Held, the will was subscribed by the testator at the end of the will, within the meaning of the statute, 2 Rev. Stat. pp. 63 & 40, and that the execution thereof was valid.(4)

11 c. A will was written on one side of a sheet, but the signatures of the testator and attesting witness were on the other side. Held, a signing at the "foot or end," within the requirement of the statute.(5)

12. The object of the statute in requiring *witnesses*, was to prevent the evils arising from the private execution of wills. Its provisions upon this subject are literally re-enacted in several of the States.

13. In Massachusetts and Vermont, the will must be attested by three or more competent witnesses; in Michigan and Maine, three; in Ohio, two, who see the subscription or hear an acknowledgment of it; in Missouri and Kentucky, by two or more, unless, in Kentucky, the will be wholly written by the testator. In South Carolina, by three *credible* witnesses; in Maryland, three or four; in Maine, three; in Vir-

(1) *Right v. Price*, Doug. 241.

(2) *Winsor v. Pratt*, 5 Moo. 484.

(3) *Martin v. Hamlin*, 4 Strobb. 188.

(4) *Tonnelo v. Hall*, 4 Comst. 140.

(5) *Jermyn v. Hervey*, 1 Eng. L. & Equ.

ginia, (unless wholly written by the testator,) Illinois and Delaware, two or more; in Virginia, both present together; in New Hampshire and Rhode Island, three or more. In Alabama, three or more *respectable* witnesses. In Mississippi, unless wholly written by the testator, (a) three or more witnesses. In New Jersey, Vermont and Connecticut, three; in Indiana and New York, two. In Pennsylvania, it is not necessary that the witnesses should subscribe, but only prove the execution. Two *competent* witnesses. (b) In Tennessee and North Carolina, (c) there must be two *disinterested* subscribing witnesses: but when a will is found among the valuable papers or effects of one deceased, or has been deposited by him for safe keeping, and it is proved by three credible witnesses to be written and subscribed by him, or his name is inserted in some part thereof, and his hand is generally known by his acquaintances, the devise shall be valid. (d) In New Jersey, the will must be signed *and published* by the testator. In Illinois, two of the witnesses must testify that they saw the testator sign in presence of the others, and believe him to be of sound mind, &c. (1)

14. In Massachusetts, it is held, that the legislature, in requiring three subscribing witnesses, did not contemplate the mere formality of signing their names; but they are placed around the testator to ascertain and judge of his capacity, and must be produced, if living and in the power of the court. If not, the next best evidence is of necessity admissible. (2)

(1) Misso. St. 617; Illin. Rev. 611; Ind. Rev. L. 272; 2 Ky. St. 1537-8-9; Del. St. 1829, 556; 1 Verm. L. 336; Aik. Dig. 448; Missi. Rev. C. 32; Conn. St. 195; Park & J. 467; Ten. L. 706; 1 N. C. Rev. St. 619-20; N. J. L. 1837-8, 218; Vir. L. 1822, 27-8; Code, 516; Ohio St. 243; Mich. Rev. St. 270,

271; Swan, 992; Ark. Rev. St. 764; N. H. Rev. St. 311; Doe v. Pattison, 2 Blackf. 355; Verm. Rev. St. 254-5; Me. Rev. St. 375.

(2) Chase v. Lincoln, 3 Mass. 236; Sears v. Dillingham, 12 Mass. 358; acc. Jones v. Arterburn, 11 Humph. 97.

(a) In which case, in Arkansas, the signature may be proved by three witnesses. But a will formally executed will avoid the operation of such informal instrument.

(b) A memorandum, taken in writing from the mouth of the testator, for the purpose of drawing from it a formal will, read over to, and approved by, him, may be proved as a will. So a devise need not be proved by the subscribing witnesses. Rohner v. Stehman, 1 Watts, 442; (Hight v. Wilson, 1 Dall. 94.)

(c) Both must sign in presence of the testator. Ragland v. Huntingdon, 1 Ired. 561.

(d) In Tennessee, to make a will valid under the act of 1784, ch. 10, it must appear, that the will is entirely in the handwriting of the testator, and his name must be subscribed to or inserted in some part thereof. The handwriting must be proved by three witnesses to be that of the testator, and also generally known to his acquaintances; that is, must be so well known, that, if a false will were propounded for probate, proof of its falsity might be obtained among the testator's acquaintances. The will must be found amongst the valuable papers or effects of the testator, or be deposited with some person for safe keeping. It being the intention of the statute, that it should appear that the existence or place of deposit of the paper, propounded as a will, was known to the maker, and that he had its preservation in view as his will. Tate v. Tate, 11 Humph. 465.

The Tennessee act of 1774, c. 10, provides, that, when any will may be found amongst the valuable papers or effects of a person deceased, in the handwriting of such person, and his name subscribed thereto, or inserted in some part of such will, it shall be sufficient to convey an estate in lands. Held, the statute prescribes a special case, which, being complied with, will make a will valid without a signature or subscribing witnesses, so far as authentication is concerned; that, the mode of authentication being complied with, the question arises, whether the paper propounded was intended by the party to be his will; and in the absence of the testator's signature, or, if there be an attesting clause, and no witnesses, if it do not contain a disposition of all the party's estate, or if he made from time to time alterations without appointing executors or coming to a conclusion, or if the paper appear in the form of loose memoranda or notes; a presumption arises from any of these circumstances, that the writer did not intend the paper to be and operate as his last will; but such presumption may be removed by satisfactory proof. Crutcher v. Crutcher, 11 Humph. 377

15. In Pennsylvania, if the will is written by the testator, his handwriting may be proved by two witnesses. And if there be but one subscribing witness, circumstances, which go directly to the act of disposition itself by the testator, may be given in evidence to supply the want of the other witness.(1)

16. An issue, as to the attestation of witnesses in presence of the testator, includes not only the subscription of their names in his presence, but also the fact of his signing and publishing the will.(2)

17. In Massachusetts, any one interested in the estate of a testator may require the production and testimony of all the witnesses, if living, competent, and within the power of the court; if not, such proof may be dispensed with from necessity. And, if the will be proved and allowed upon the testimony of two witnesses, it will be presumed that the absence of the other was duly accounted for, though it does not appear on record.(3)

18. Absence of an attesting witness from the State is held a sufficient reason for not producing him, although a statute expressly authorizes a *dedimus* in such case.(4)

19. If the witnesses deny their attestation, or fail to prove the execution, circumstantial evidence is admissible; and the most direct and usual evidence is proof of their handwriting. But the proof ought to be very clear. The witness need not recollect the time and occasion of subscribing, but only recognize his handwriting, and be assured that he never subscribed without a due acknowledgment, &c., by the testator.(5)

20. In New York,(a) it has been held that the execution of a will may be proved, in a trial at law, by one of the witnesses, though the will be lost or not produced. So if one of the witnesses testify to an attestation by three, but forget the name of one of them, having no doubt, however, of his competency; this is sufficient. So where one witness remembers that the others *were present*, and knows their hand, which is also proved by others; this is sufficient proof.(6)(b)

(1) *Eyster v. Young*, 3 Yeates, 511; *Boudinot v. Bradford*, 2, 170. See *Clark v. Morton*, 5 Rawle, 235.

(2) *Amory v. Fellowes*, 5 Mass. 219.

(3) *Chase v. Lincoln*, 3 Mass. 236; *Sears v. Dillingham*, 12, 358; *Brown v. Wood*, 17, 68. See *Browne v. Molliston*, 3 Whart. 129; *McDonald v. McDonald*, 5 Yerg. 307; *Doe v. Pearce*, 2 Moo. & R. 240; *Crank v. Frith*, Ib. 262; *Barney v. Chittenden*, 2 Greene, 165.

(4) 3 Marsh. 90; *Turner v. Turner*, 1 Lit. 103. See 2 N. J. L. 91; 2 Ky. L. 1543; Aik.

Dig. 449; *Glubb v. Edwards*, 2 M. & Rob. 200.

(5) *Pearson v. Wightman*, 3 Const. S. C. 336, 344. See *Browne v. Molliston*, 3 Whart. 129; *Gwinn v. Bradford*, 2 Lit. 137; *Jones v. Arterburn*, 11 Humph. 97.

(6) *Dan v. Brown*, 4 Cow. 483. See *Reid v. Vanderheyden*, 5, 719; *Jackson v. Thompson*, 6, 178; ——— *v. Betts*, Ib. 377; *Lawrence*, 2 Wend. 297; *Fetherly v. Waggoner*, 11, 599; *Turner v. Turner*, 1 Lit. 103-4. See *Telford v. Barney*, 1 Iowa, 575; *Jolly*, 1 Halst. Ch. 456.

(a) By a late act, at least two witnesses must prove the will, if living in the State, sane, and able to attend. If contested, all. If all are dead, &c., their handwriting may be proved. N. Y. L. 1837, 526-8. See Ib. 1834, 32, 574.

(b) In Tennessee, Ohio, Michigan and New Hampshire, one witness may prove the will, unless contested, and then all must be produced. Ten. St. 708; Ohio St. 244; Mich. Rev. St. 272; N. H. L. 337. In Ohio, if a witness is absent, or has become incompetent, the proof is the same as if he were dead. Swan, 994. In Connecticut, the witnesses may be sworn before a justice of the peace. So a will may be proved during the testator's life. Con. St. 196, 212.

21. A will, accompanied by forty years' possession under it, is admissible as an *ancient deed*, without proof of execution.(1)

22. With regard to the witnesses of a will, Lord Mansfield thus generally expresses the liberal construction of the statute. It is not necessary that the witnesses should attest in presence of each other,(a) or that the testator should declare the instrument to be his will, or that the witnesses should attest every page, folio or sheet, or that they should know the contents, or that each folio, page or sheet, should be particularly shown to them. And it has even been held, that if the witnesses sign in presence, and by request, of the testator, this is sufficient, though they did not see his signature, and only one of them knew what the paper was.(2)

23. With respect to the mode of examining the witnesses to a will, it is said, a witness should not only prove the subscription of himself and the testator, but also that of the other witnesses in the testator's presence. In this way, one witness proves the full execution.(3)

24. It seems to be now settled, though long *vexata questio*, that an acknowledgment by the testator of his signature before the witnesses is sufficient, though they did not actually see him sign. The word *attest* is not inconsistent with this principle, but is to be construed in analogy to the rule concerning deeds, the signing of which is to be considered as *attested*, if acknowledged before the witnesses. An attestation of the acknowledgment is, in some sense, an attestation of the act itself. (This is *enacted* in Arkansas and Ohio.)(4)(b)

25. In case of such acknowledgment, the will need not be before the testator at the time. It may be at a distance, on the table.(5)

26. But, in New Jersey, acknowledgment by the testator of his signature is insufficient. The will must be published in presence of the witnesses, either wholly by the testator, or by questions from the scrivener or other agent, and answers by words or signs, indicating the testator's assent to a publication.(6) (See sec. 63.)

(1) *Jackson v. Thompson*, 3 Cow. 178.

(2) *Bond v. Seawell*, 3 Burr. 1773; 1 Bl. R. 407; *White v. British, &c.*, 6 Bing. 310. See *Wright v. Wright*, 7, 457; 1 C. & M. 140.

(3) *Longford v. Eyre*, 1 P. Wms. 740; *Dewy v. Mitto*, 1 Green. 70; *Deakins v. Hollis*, 7 Gill & J. 311. See *Suggett v. Kitchel*, 6 Yerg. 425; *Sharp v. Sharp*, 2 Leigh, 249; 2 J. J. Marsh. 511; 2 Marsh. 467; 5 Monr. 199.

(4) *Stonehouse v. Evelyn*, 3 P. Wms. 254;

Grayson v. Atkinson, 2 Ves. 454; *Ellis v. Smith*, 1 Ves. 10; *Westbeech v. Kennedy*, 1 Ves. & B. 362; *Hall v. Hall*, 17 Pick. 373; *Cochran*, 3 Bibb, 494; 3 Marsh. 146; *Ohio St. 243*; *Ark. Rev. St. 764*; *Rosser v. Franklin*, 6 Gratt. 1; *Adams v. Field*, 21 Verm. 256.

(5) *Elbeck v. Granberry*, 2 Hayw. 232.

(6) *Den v. Mitton*, 1 Green, 70; N. J. L. 1837-8, 218.

(a) Otherwise in Vermont. 1 Verm. L. 337. One witness testified, that he signed the testator's name at his request. The other testified, that the former requested the testator to sign his name, who said he felt weak and could not write, but made his mark; that the first witness then signed the testator's name in his presence, but the testator said nothing which the second witness could recollect. Held, the will was invalid under the statute of Pennsylvania of April 8, 1835, requiring a signing by the testator, or some one in his presence, and by his express direction. *Barn v. Grayhill*, 1 Harr. (Pen.) 396.

(b) In New York, it is not necessary that the witnesses should have been requested in terms by the testator to attest. The request may be implied. *Brown v. De Selding*, 4 Sandf. 10.

Where witnesses are sent for by the attendants of the testator, in his presence and without objection, and, upon their introduction, he sets himself to the execution of the will, and delivers it, when executed, to the witnesses, in order that they may sign it, and they do sign it in his presence; he thereby adopts the acts of the attendants, and makes their request his request, within the spirit and meaning of the statute. Ib.

27. If the witnesses set their marks or initials to the will, instead of signing it, this is a good attestation.(1)

28. Where the testator was blind, the will has been held good, though not read over to him before the witnesses. So it is sufficient, in case of the will of a blind man, if the witnesses attest within reach of his other senses, when he is conscious of what they are doing, and may ascertain that they are subscribing the will which he signed. So, although the testator could neither write nor read, and the will was not read to him, the execution of it was held sufficient.(2)

28 a. If a negro interpreter, incapable by law of being sworn, is the only channel of communication between the testator and scrivener who writes the will, and there is no other evidence of the testator's knowledge of its contents, or his assent thereto, than that which is derived through this medium, the will cannot be executed; but, if the will be written in the presence of the testator, and in a language which he understands, and it is read over to him, and his dictation and approval of the instrument are interpreted by a negro in his hearing, and in the hearing of others interested in its contents, and he signifies no dissent thereto, by signs or otherwise, but, on the contrary, is understood to express himself satisfied, the will may be established; especially if made in conformity to the previously declared intentions of the testator.(3)

29. It has already been considered, in some respects, what peculiar formality is rendered necessary by the writing of a will upon separate sheets of paper. Another important question has been raised upon this point, with regard to the necessity of the witnesses' seeing every part of the instrument. The general principle is, that a will properly attested may, by reference to another instrument, establish particular clauses, so ascertained by a clear reference, as strongly as if they were repeated *verbatim*; and the same rule seems applicable to different parts of one will.

30. A wrote a will upon two sheets of paper, and signed it at the bottom of each page. The words were so written as to require, in order to make sense, that they should be read from the bottom of each page to the top of the next; and this was peculiarly the case in passing from one sheet to the other. A codicil was made in like manner upon one sheet. A showed to B both sheets of the will and his signatures, and told him it was his will. He also showed him the codicil, and desired him to attest both, which he did on the last sheet of the will and on the codicil. B having left the room, C and D immediately came in. A showed them the codicil, and the last sheet of the will, sealed them in their presence, took each of them up, and delivered it as his act and deed. C and D then attested the same, but never saw the first sheet of the will, nor was it produced to them, nor was there any paper on the table. After A's death, both sheets of paper and the codicil were found in his bureau, wrapped together. Held, if the first sheet was in the room when the second was executed, the attestation was good for the whole, there being clear references from one part to another; if not, it might be doubted whether it was good; but that every

(1) *Harrison v. Harrison*, 8 Ves. 185, 504; 415; *Shanks v. Christopher*, 3 Marsh. 145; *Adams v. Chaplin*, 1 Hill, 266; *Jackson v. Boyd v. Cook*, 3 Leigh, 32; *Ray v. Hill*, 3 Van Dusen, 5 John. 144; *Collins v. Nicols*, 1 Strobb. 297.

H. & John. 399.

(3) *Potts v. House*, 6 Geo. 324.

(2) *Longchamp v. Fish*, 2 Bos. & P. N. R.]

presumption ought to be made by a jury in favor of such a will, when there was no doubt of the intention; and, if it was doubtful whether the first sheet was in the room, the circumstances were sufficient to presume that it was.(1)

31. In a late case it has been held, that an unattested will or codicil is valid, if confirmed by one attested, though not annexed to the latter, nor seen by the witnesses. But the latter instrument must distinctly refer to the former. And a will, consisting of two distinct parts, only one of which is attested, is not duly executed, unless the other be present at the time.(2)

32. The statute requires that the witnesses attest and subscribe *in presence* of the testator. Hence, though he subscribe in their presence, if they then go into another room and there subscribe, the will is void.(3)

33. The testator is not in law *present*, if *insensible*.(4)

34. But it is sufficient that the testator *might* see the attestation. Thus, if he turn his back upon the witnesses, or close the curtains of his bed, or if they at his request go into another room, seven yards distant, having a broken window, the attestation is good. So, where one witness swears that he attested at the request of the testator, and two others that they saw the will executed in the same room, and subscribed it in presence of the testator; the testimony of the former is sufficient to negative any fraud in his attestation; though being in the same room would not necessarily have this effect: because the act might be done in a corner, clandestinely and fraudulently. So, where a testatrix went to the office of her attorney in a carriage, and, she having executed the will in the carriage, in presence of the witnesses, they went into the office, and attested it, and the carriage was so placed that she might see them attest through the windows; and they immediately brought the will to her, and she took it; the attestation was held sufficient.(5)

35. Where the testator and witnesses are in one room, attestation in presence of the former is presumed; where they are in different rooms, the contrary is presumed. In each case, the presumption may be rebutted. In the former case it is sufficiently rebutted, by showing that the relative situation of the parties rendered it impossible for the testator to see the attestation, and also to change his position without aid, which, though at hand, was neither asked nor given.(6)

36. The testator's power of *hearing* the witnesses is an immaterial circumstance.(7)

36 a. A made his will while in a *comatose* condition, and died two days after it was executed. It was written by the executor, who, by the will, had great powers and discretion, though none in which he was not responsible to the courts. A dictated the substance of his will, went over, one by one, the minutes from which it was written out, heard it

(1) Boud v. Seawell, 3 Burr. 1773; 1 Bl. R. 407.

(2) Utterton v. Robins, 1 Adol. & El. 423; Gass v. Gass, 3 Humph. 278.

(3) Broderick v. Broderick, 1 P. Wms. 239.

(4) Right v. Price, 1 Doug. 241. (See Clerk v. Ward, 4 Bro. Parl. 71; Winchelsea v. Wauchope, 3 Russ. 441.)

(5) Shires v. Glascock, Salk. 688; Helliard

v. Jennings, 1 Ld. Ray. 507; Longford v. Eyre, 1 P. Wms. 740; Alsey v. Howard, 5 Monr. 202; Casson v. Dade, 1 Bro. 99; Robinson v. King, 6 Geo. 539.

(6) Neil v. Neil, 1 Leigh, 6; Doe v. Manifold, 1 M. & S. 294; Tod v. Winchelsea, 2 C. & P. 488; White v. Trustees, &c., 6 Bing. 310; Wright v. Wright, 7, 457.

(7) Ib.

finally read over, and made some alterations in it. When he signed it, he fell back into *coma*, being fatigued, and, the witnesses being brought in, he, on being aroused, said, "I acknowledge it." He then relapsed: the will was taken to a table back of the head of the testator's bed, and there witnessed. Held, it was not legally attested.(1)

36 *b*. Two of three witnesses, when signing, were in a different room from the testatrix, and not in her presence, view or hearing, although in a room connected by an intermediate room with that in which she lay. Held, not a signing in her presence.(2)

36 *c*. A testatrix, being in *extremis*, was raised up in her bed and executed her will, and then it was attested by witnesses close by the bed, but it did not appear that she actually saw the attestation. Held, the attestation was sufficient.(3)

36 *d*. Where a testator was lying ill in bed, and gave his will to be attested into the hands of the persons selected as witnesses, who went with it into an adjoining room, the door of which stood open, and the backs of the witnesses were visible to the testator, but he could not see the paper they attested, nor their hands, while they attested; held, not a valid attestation.(4)

36 *e*. In New York, where attesting witnesses saw the testator sign, were requested by him to sign as witnesses, and subscribed, not in his immediate presence, but in an adjoining hall; held, a sufficient attestation, the statute not requiring the witnesses to sign in the testator's presence.(5)

37. The law does not require, that the fact of the witnesses' signing in presence of the testator should appear in the attestation itself; nor will a declaration to that effect be conclusive of the fact. The matter seems to be open to proof either way; and this proof may be wholly circumstantial, as, in case of the death of the witnesses, it generally will be. The signing itself has been held to furnish a presumption that it was regularly done. So the respectability and professional knowledge of one of the witnesses, being an attorney. So, where the attestation set forth merely an execution by the testator in presence of the witnesses, whose handwriting was proved; this was left as evidence to the jury, who found for the will.(6)

38. The law does not require that all the witnesses *attest at the same time*. No such requisition is found in the statute of frauds, and the courts will not go beyond the statute, which demands only the oaths of three attesting witnesses, giving them the same credit at different times as at one time. In one case, a will was held valid, though one of the witnesses attested four years after the others, the testator passing a pen over his name in presence of the third witness.(7)

39. Where a testator, before executing his will, has written another paper to which the will distinctly refers, such paper becomes in law incorporated with the will, and is valid, though not executed according

(1) Orndorff v. Hummer, 12 B. Mon. 619.

(2) Boldry v. Parris, 2 Cush. 433.

(3) Bynum v. Bynum, 11 Ired. 632.

(4) Graham v. Graham, 10 Ired. 219.

(5) Lyon v. Smith, 11 Barb. 104.

(6) Hands v. James, Com. R. 530; Brice v.

Smith, Willes, 1; Croft v. Pawlet, 2 Stra. 1109.

(7) 2 Cha. Cas. 109; Cook v. Parsons, Prec. in Cha. 184; Jones v. Lake, 2 Atk. 176, n.; Westbeech v. Kennedy, 1 Ves. & B. 362; Ellis v. Smith, 1 Ves. jun. 14, 16.

to the statute, if the will be thus executed.(a) But this principle seems not to have been held applicable to the case of a will and subsequent codicil. Thus, where a will was executed in the presence of two witnesses, and afterwards a codicil, reciting the making of the will, and in all things confirming it, was also executed in presence of two witnesses, one of whom had attested the will, but was distinct from and not annexed to the will; it was held, that neither the will nor codicil could carry the land alone, and that the three witnesses under the statute ought to witness the whole. So, where a will was executed without any witness, and afterwards a codicil, reciting the will, with four witnesses, the will was held to be invalid, because the two instruments might be executed at different places, and the witnesses neither see nor know of the will.(1) (See sec. 41.)

40. But where a codicil is written on the same sheet with, and declared to be annexed to, the will, altering it in some points, and in all others confirming it, a legal attestation of the codicil is sufficient for both, amounting to an adoption, re-execution, and republication of the will.(2)

41. Where a testamentary disposition is made at different times, and in distinct parts, each separately signed; if it appear that the testator regarded the whole as constituting one will, a legal attestation of the last part will be sufficient for all.

42. A testator wrote upon the two first pages of a sheet of paper a disposition of real estate, as his *last will*. Nearly two years afterwards he wrote upon the same sheet, beginning either at the bottom of the second, or the top of the third page, an instrument called a *memorandum*, disposing of personal property, and declaring that it should "not disannul any of the former part." Both instruments were separately signed, and the last subscribed in the presence of three witnesses, the testator taking the paper and declaring it to be his last will, delivering it to the witnesses, and requesting them to attest, which they did. Held, the facts showed, that the testator regarded the whole as one instrument, and not the latter part as a codicil, the word *memorandum* being used; that, as the latter part did not dispose of lands, the attestation could have been designed only to render valid the former part, the testator having discovered the necessity for witnesses between the making of the two; that the form of publication applied to the whole paper; and that the whole, therefore, was legally attested.(3)

43. Where there are two subscribing witnesses to the will, and two to the codicil, written upon the back of, and referring to and altering the will, one of the latter being a different person from the witnesses to the will; this is not a sufficient attestation of the will.(4) (See sec. 39.)

43 a. A will and second testamentary paper were written on the

(1) *Habergham v. Vincent*, 2 Ves. 228; *Bond v. Seawell*, 3 Burr. 1775; *Lea v. Libb*, Rep. Temp. Holt, 742; Att. Gen. v. Barnes, Gilb. R. 5; Prec. in Cha. 270.

(2) *De Bathe v. Fingal*, 16 Ves. 167.

(3) *Carleton v. Griffin*, 1 Burr. 549.

(4) *Dunlap v. Dunlap*, 4 Desaus. 312.

(a) A will ordered a sale of real and personal estate, the proceeds to pay such legacies as should be bequeathed by a codicil. A codicil was afterwards made, but not legally attested. Held, the legacies thereby given were chargeable on the lands. *Swift v. Nash*, 2 Keen, 20. See *Radburn v. Jervis*, 3, 450. *Tonnele v. Hall*, 4 Comst. 140.

same sheet of paper; the will was duly executed, but the other paper was merely signed by the testatrix. Probate of the will alone decreed.(1)

44. A will being signed by the testator, and duly attested by A, he inserted the date and the words, "my dearly beloved," and the will was then attested by B, and the testator, in presence of A and B, acknowledged it as his act and deed. Held, a sufficient execution.(2)

45. Devise of all the testator's lands *then in his possession*. He afterwards acquired others, and altered his will so as to make it include all lands of which he should *die seized*, and indorsed upon the will a memorandum of the fact, stating the alterations, and attested by two witnesses. Held, the original devise was not destroyed, but that the alteration was inoperative, for want of attestation, and the after-purchased land did not pass.(3)

46. A testator having acquired a house since the making of the will, by several unattested memorandums left it to A; but afterwards, by an unattested codicil, called "a further codicil to my will," gave all real estate purchased since the will to B. Held, the house passed to B.(4)

47. The statute of frauds requires that the witnesses to a will be *credible*. The effect of this word is said to be, that all persons, who would be good witnesses in any other matter, are also good attesting witnesses. A very slight interest, however, was formerly held to disqualify one for a witness; as for instance, that of a devisee, legatee or creditor. To remedy this inconvenience, a statute in England, 25 Geo. II, c. 6,(a) provides, that where one, having a devise, appointment &c., in his favor, unless it is a mere charge of debts upon lands, attests the will, such devise, &c., shall, as to him only, or any one claiming under him, be void, and he shall be a good witness. Also, that a creditor, whose debt is charged on lands, shall be a good witness. In each case, the credit of the attesting witness is open to inquiry, as in ordinary cases. This act was passed, in consequence of the decision, first made in the case of *Holdfast v. Dowsing*,(5) that a devisee was an incompetent witness; which, according to Judge Blackstone,(6) "threatened to shake most of the titles in the kingdom." The statute referred to also settled another important question, viz.: whether the incompetency of an attesting witness, at the time of attestation, could be cured by a subsequent removal of his interest, before being called on to prove a will. In the case of *Windham v. Chetwynd*, Lord Mansfield held to the affirmative of this question. But, in *Doe v. Kersey*, Lord Camden made a contrary decision, which has been complimented on all hands, for its uncommon acuteness, learning and eloquence.(7)

48. It was early held in Massachusetts, that the words *credible witnesses*, used in the former statute of wills, must be construed to mean *competent witnesses*, and those competent *at the time of attestation*; so that, if *at the time* the witnesses were such as the law would permit to be sworn,

(1) Taylor, 9 Eng. Law and Eq 582.

(2) Bateman v. Mariner, 1 Mur. 170. (See Wheeler v. Bent, 7 Pick. 61; 4 Monr. 154.)

(3) Jackson v. Holloway, 7 John. 394.

(4) Utterton v. Robins, 1 Adol. & El. 423.

(5) Holdfast v. Dowsing, Stra. 1253.

(6) 2 Bl. Com. 377.

(7) 6 Cruise, 57; 1 Burr. 414; C. B. Easter T. 1765; Pow. on Devis. 131; Cornwell v. Isham, 1 Day, 41, n.

(a) Repealed, but substantially re-enacted by St. I Vict. ch 26, which, however, drops the word "credible."

and their credit weighed, no subsequent incompetency would affect the validity of the will. This is now enacted both in Maine, Vermont, Massachusetts and Michigan. *Credible* has also been held to mean *competent*, at the time of attestation, in South Carolina.(1)

49. It has been held in South Carolina, that a devisee is an incompetent witness to a will. His interest is a vested one, and the chance of its lapsing is a mere possibility.(2)

50. But a witness is competent, though taking an interest under the will, if he has an equal or greater interest against it. So a will is good, though attested by a devisee, if there is the requisite number without him.(3)(a)

51. A witness is not incompetent, because he holds a covenant of warranty from the testator. The devisee and his heir would be equally liable upon such covenant.(5)

52. One appointed executor in a will is held a *credible witness*; because his interest is contingent, depending upon his acceptance of the trust, more especially where he renounces before intermeddling. So the surety of an administrator.(5)

53. A legatee may of course be a witness *against* the will.(6)

54. *Infamy* disqualifies a person for an attesting witness; as, for instance, conviction of the crime of sheep-stealing. So a want of any sense of religious obligation.(7)

55. The provisions of the Statute of Geo. II, above referred to, have been substantially adopted in many of the States. In Virginia, Connecticut, Arkansas, Vermont, Ohio, Missouri and Illinois, where a witness is a legatee in the will, which cannot be proved without him, the legacy is void; but, if he is also an heir at law, he shall have a portion equal to the legacy.(8)

56. In Missouri and Arkansas, payment, acceptance, release or refusal of the legacy, or the death of the legatee before that of the testator, makes the attestation valid; leaving his credit open to inquiry.(9)(b)

57. A few cases have arisen, where an attesting witness, though interested in the will, was not interested in such a manner as to fall

(1) *Amory v. Fellowes*, 5 Mass. 219; *Sears v. Dillingham*, 12, 358; *Bacon v. Bacon*, 17 Pick. 134; *Garland v. Crow*, 2 Bai. 24. (See *Hall v. Hall*, 17 Pick. 373; 3 Const. (S. C.) 336; Mich. Rev. St. 270-1; Mass. Rev. St. 417; Verm. Rev. St. 255; *Jones v. Scott*, 2 Alab. (N. S.) 58. *Workman v. Dominick*, 3 Strobb. 589.

(2) *Snelgrove v. Snelgrove*, 4 Desaus. 279. (3) *Garland v. Crow*, 2 Bai. 24; (*Ackless v. Seekright*, 1 Bre. 46.)

(4) *Thompson v. Shoeman*, 1 Bibb, 401.

(5) *Sears v. Dillingham*, 12 Mass. 358;

Berry v. Hamilton, 10 B. Mon. 129; *Comstock v. Hadlyme*, 8 Conn. 254; *Orndorff v. Hammer*, 12 B. Mon. 619; *Filson v. Filson*, 3 Strobb. 288; *Croft v. Croft*, 4 Gratt. 103.

(6) *Oxenden v. Pencerice*, Salk. 691.

(7) *Pendock v. Makender*, 4 Burns' Eccl. L. 95; *Curtiss v. Strong*, 4 Day, 51.

(8) Conn. Sts. 1848, 36; Walk. 340; *Swan*, 993; Conn. St. 226-7; Illin. Rev. L. 615; *Misso*. St. 619; Ark. Rev. St. 770; Verm. Ib. 255; Vir. Rev. C. 377.

(9) *Misso*. St. 619; Ark. Rev. St. 770.

(a) In England, under Statute 25 Geo. II, ch. 6, a devise to an attesting witness is void, though there are three without him. *Doe v. Mills*, 1 M. & Rob. 288.

(b) The statute in question is substantially re-enacted in Maine, Rhode Island, New Hampshire and Georgia. In Connecticut, Ohio, Michigan, Kentucky, Mississippi, Alabama and Virginia, with the qualifications, that a witness may take, if there are enough without him; or, if he is an heir, a share not exceeding his devise. In Vermont, the latter alone. In Massachusetts, the former alone. In Tennessee, a legatee in a will is not a good witness to a codicil. The above statute is not in force in relation to this point. *Gass v. Gass*, 3 Humph. 278.

within the provisions of the above statute of Geo. II and corresponding American acts, and in which the validity of the devise therefore was decided upon other grounds. These are cases of a *consequential* interest, arising not from a direct devise to the witness himself, but from a devise to some other person, with whom the witness was in law connected.

58. Thus where a reversion expectant upon a life estate was devised to A, a female, whose husband was an attesting witness to the will; and both the testator and A died before the termination of the life estate; held, the husband was an incompetent witness.(1)

59. Devise to the wife of the testator for life, then to trustees for the use of such persons as shall hereafter reside in a certain part of Boston, to be applied to the support of the Gospel ministry in a congregational church and society, which may be there organized, and to the establishment of a school there. The attesting witnesses resided there. Held, they were not incompetent from interest, such interest being wholly contingent, for the following reasons; that it was uncertain whether they would survive the wife, whether there would be a church, &c., in the place referred to, and whether they would belong to it; and also uncertain, whether the devise would relieve them from taxation, without which the advantages of public worship and of education would constitute no disqualifying interest.(2)

60. In another late case in Massachusetts, the question was raised, whether members of a *parish* are good attesting witnesses to a will which contains a devise to such parish. It was contended, that the form of the devise was not such as to render the witnesses *devisees* and thereby avoid the devise, it being made not to them, but to the parish of which they were members; and also, that a statute, making the members of all public corporations competent witnesses for such corporations in *suits at law*, did not embrace the attestation of a will. The former of these grounds was not contested, either by counsel, or by the court; but in regard to the latter it was held, that the witnesses were made competent by the statute referred to.(3)

61. It has also been held in Connecticut and New Hampshire, that a principle of *State common law*, or immemorial usage, by which corporations are made competent to testify, also renders them good attesting witnesses to a will.(4)(a)

62. In Maryland, persons incompetent to establish a will from interest may become competent by assigning such interest.(5)

63. It is said, *publication* is necessary to the validity of a will,(b) meaning thereby some act, over and above the execution before witnesses and their attestation, showing that the testator intended the instrument to operate as his will. The words, signed and *published* by A, "as and for his last will," are a sufficient publication. So a publication to one witness is sufficient. So the delivery of a will, as a deed.

(1) Hatfield v. Thorp, 5 B. & A. 589. See Greer v. M'Crackin, Peck, 301. Also, Jackson v. Woods, 1 John. Cas. 163; ——— v. Durland, 2, 314, *contra*.

(2) Hawes v. Humphrey, 9 Pick. 350.

(3) Haven v. Hilliard, 23 Pick. 10.

(4) Cornwell v. Isham, 1 Day, 35; Eustis v. Parker, 1 N. H. 273.

(5) Deakins v. Hollis, 7 Gill & J. 311.

(a) In Delaware, relief from taxation is no disqualifying interest in attesting witnesses. Del. St. 556.

(b) The late statute of Victoria upon wills dispenses altogether with *publication*.

And a publication may be inferred from circumstances. In Kentucky, the signing and attestation of a will are a sufficient publication. In Maine, the testator need not declare the instrument to be his will before the witnesses. In New York and Arkansas, he must declare it to be such.(1)(a) (See sec. 26.)

64. Where a paper containing the substance of a will is found in the possession of the deceased, not attested, but with the usual act of execution subjoined, this is sufficient, without evidence of publication, to establish the paper as a testamentary act. Otherwise, if there is a want of any formal act of authentication.(2)

65. It has been sometimes supposed, that a testator might, by a will duly executed, reserve or create to himself a power to dispose of his land by a subsequent instrument, not duly executed; as by devising to trustees, in trust for such uses as he should hereafter appoint. This doctrine, however, has been opposed by a distinguished writer, as amounting to a dispensation from the formalities provided for the prevention of fraud by the statute of frauds, and even from the requisition of the statute of wills, that a devise should be in writing.(3)

66. Devise to trustees in fee, to the use of A for life, remainder to her sons in tail, &c., remainder to such uses as the testator by any deed or instrument, attested by two or more credible witnesses, should appoint. The testator, by a deed dated the day after the will, attested by two witnesses, and reciting the will; in pursuance of the power thereby reserved, limited his estates, after the death of A, her sons, &c., in a

(1) *Ross v. Ewer*, 3 Atk. 161; *Peat v. Ongley*, 1 Com. R. 196; *Trimmer v. Jackson*, 4 Burns' Eccl. L 114, 119; *Moodie v. Reid*, 7 Taun. 356; *Ward v. Swift*, 1 C. & M. 175; *White v. British, &c.*, 6 Bing. 310; *Ray v. Walton*, 2 Marsh. 74; *Small v. Small*, 4 Greenl. 220; *Remsen v. Brinkerhoff*, 26 Wend. 325; *Ark. Rev. St.* 764; *Swift v.*

Wiley, 1 B. Monr. 118; *Allen v. Bradshaw*, 1 Curties, 110; *Heyer v. Berger*, 1 Hoffm. Ch. 1; 7 Taun. 355; 4 Kent, 514, 5; *Chaffee v. Baptist, &c.*, N. Y.; *Vincent v. The Bishop, &c.*, 3 Eng. L. & Eq. 198.

(2) *Barnet*, 3 Rawle, 15.

(3) *Fearne Opin.* 435.

(a) A will having been written by a third person, the testatrix signed it, and acknowledged her hand and seal before the subscribing witnesses, but it was not read to her, nor was anything said to show that it was her will. The attestation clause was not read, but it stated a publication of the will. Held, the will was invalid. *Brinkerhoff v. Remsen*, 8 Paige, 488. It is sufficient, that the testator informs the witnesses, that he knows the nature of the instrument, and distinctly recognizes it as his will. And the statement of a publication in the attestation clause, is *prima facie* evidence of it. *Ib.*

Where a testator had previously signed his will, and the attestation clause (which was in the usual form, "signed, sealed, published," &c.) was read in his presence and that of the witnesses, followed by his affirmation that it was his last will and testament; held, a complete fulfilment of the requirement of the statute on that subject. *Whitbeck v. Patterson*, 10 Barb. 608.

No particular form of words is necessary, if the statute is complied with in substance. There must, however, be a declaration by the party, to the attesting witnesses, that the instrument is his will. *Brown v. De Selding*, 4 Sandf. 10.

The testatrix, at the time of execution of the will, asked "where was the proper place for her to sign?" but the will was not read by her, nor to her, nor anything said concerning its contents, nor anything said or done by her in the presence of attesting witnesses, by which she indicated that the paper was her will. Held, the instrument was not declared or published as a will. *Ib.*

In Delaware, the formal execution of a will is a publication; and, in a case of undoubted capacity, it need not be proved that the will was read to, or by, the testator, if it appears that he knew the contents. *Smith v. Dolby*, 4 Harring. 350.

In Kentucky, where the name of a testator appeared in the body of his will, and he published it, and caused it to be witnessed by one person, in his presence, and afterwards signed it in the presence of another witness; held, a good execution and publication. *Allen v. Everett*, 12 B. Mon. 371.

certain way. Held, by the Court of King's Bench, that the last instrument was a deed, not a will; and, on a subsequent hearing, that it was in its nature testamentary; but in either view, that it was ineffectual to create the uses therein appointed.(1)

67. The phrase "lands or tenements," in the statute of frauds, includes all interests created out of lands, such as terms for years or powers to sell or charge lands. (But see sec. 77.) So, where a legacy is given originally and primarily out of the land, as it can be raised only by a sale of the land, the will must be executed according to the statute.(2)

68. But where a will, duly executed, charges lands with all debts and legacies, and a codicil not duly executed gives other legacies, the latter are chargeable upon the land; the codicil executing a power reserved by the will. The principle is the same, as in the case where one charges his lands with all his debts; in which the charge applies to debts subsequently contracted during his life. So where one makes two wills, one of his real, the other of his personal estate, the former duly executed, the latter not, and by the former charges debts and legacies upon the land, the land is charged with legacies given by the second will. The same principle applies, where the legacies given by a second will are not new legacies, but a modification of the former; where there is merely an alteration of the intent as to the *quantum*, and a revocation *pro tanto*.(3)

69. Devise, by a will duly executed, of £400 to A, and the remainder of the testator's estate, after payment of debts and legacies, to B. A subsequent will, not duly executed, gave to A £100, to C £400, and all the rest of the estate to B. The testator having subjected his estate to the payment of debts and legacies, held, it was chargeable with the legacies given by the second will.(4)

70. So where a will, duly attested, created a term for payment of all legacies to be named in a codicil, which was afterwards made, and gave legacies *and annuities*, the annuities were held to be legacies.(5)

71. In these cases, the charge upon lands is said to be fluctuating, and merely makes them auxiliary to the personal estate, or directs that they be converted into and applied as personal estate. It is impossible previously to ascertain what debts a man may owe at his death, or what legacies he may be able or desirous to give. Hence, when debts and legacies are charged by an attested will, it is only necessary to show a debt or legacy, in order to constitute a charge; for the moment that character is shown to belong to the demand, you show that it is already charged upon the land. A legacy may be given by an informal will; when given, you predicate of it that it is a legacy; and then the charge immediately attaches, by virtue of the first will.(6)

72. Although the above rule is settled in many cases, and unquestionably too well established to be disturbed; yet it has been doubted whether it is perfectly consistent with the statute; for in effect the testator does dispose of his land by an unattested codicil, when he is at

(1) *Habergham v. Vincent*, 5 T. R. 92.

(2) *Brudenell v. Boughton*, 2 Atk. 272; *Walker v. Denne*, 2 Ves. 179. See *Mirehouse v. Scaife*, 2 My. & C. 695.

(3) *Masters v. Masters*, 1 P. Wms. 421; 2 Atk. 268.

(4) *Brudenell v. Boughton*, 2 Atk. 268.

(5) *Habergham v. Vincent*, 5 T. R. 95.

(6) *Duke, &c. v. Williams*, 2 Ves. 231; *Fearn's Opin.* 434; *Sheddon v. Goodrich*, 8 Ves. 495; *Rose v. Cunnyngghame*, 12 Ves. 29.

liberty to burden it with legacies so given. And the principle is held not to apply, where the will does not charge the land with legacies, &c., generally, but with such only as shall be afterwards given and charged thereupon, and the codicil, unattested, declares that a certain legacy shall be a charge. In such cases, not only the legacy is to be found, but also the will of the testator, to make it a charge. It is in effect an attempt to reserve, by a will duly executed, a power to charge by a will not duly executed; for, unless the testator thinks fit in his codicil to declare his intention that the land shall be charged, it will not be.(1)

73. Devise of land to trustees, in trust from the produce to pay off debts and incumbrances, and all annuities, legacies, &c., which the testator should give (and charge upon the estate) by his will or any subsequent codicil or writing, in his own hand, whether witnessed or not. By an unattested codicil, he gave an additional annuity to his wife, out of the land. Held, the land was not chargeable with this annuity.(2)

74. An unattested paper, made previously to a formal will, and clearly referred to by the latter, may perhaps make a part of the will, but a subsequent paper cannot. With regard to legacies given by an unattested paper, though it is settled that they will be included in a charge made by the will, yet this is said to be a *solitary case*. And if, by an attested will, the testator directs that an estate be sold, though he might have exhausted this fund by legacies, he cannot by an unattested will give away any part of it.(3)

75. In Massachusetts, if a will is not duly executed to pass lands, legacies bequeathed by it cannot be charged upon the real estate.(4)

76. The requisitions of the statute of frauds apply to the devise of a *trust*, as well as a legal estate. Otherwise, the statute would not be effectual to prevent frauds and perjuries. So, an equity of redemption is within the statute, being real estate. And, on the other hand, a mortgage, though merely security for debt, does not pass by an unattested will. It has been sometimes said, that a bequest of the debt will carry the mortgage also; but the better opinion seems to be, that it only gives the legatee a right to demand a conveyance from the heir.(5)

77. An existing term for years, being a chattel, might be bequeathed before the statute of frauds. Therefore, since the statute, it will pass by an unattested will. Otherwise, if attendant on the inheritance.(6) (See sec. 67.)

78. In Massachusetts, a statute of 1783 provided, that a will purporting to dispose of both real and personal estate,(a) but not duly attested to pass the former, shall not be approved as a testament of the latter.

79. But a will purporting to dispose of both lands and chattels, and

(1) 12 Ves. 29; (5 T. R. 92.)

(2) *Rose v. Cunyngame*, 12 Ves. 29.

(3) *Wilkinson v. Adam*, 1 Ves. & B. 445-6.

(4) *Winslow*, 14 Mass. 421.

(5) 6 Cruise, 64.

(6) 6 Cruise, 65; *Whitchurch v. Whitchurch*, 2 P. Wms. 236; *Villiers v. Villiers*, 2 Atk. 72.

ineffectual as to the former by reason of the *testator's incompetency*, on account of infancy, is still valid as to the latter. And the reason of the statute, and therefore the statute itself, has been held inapplicable, where the real estate and personal are both given to one person. In such case, therefore, the personal estate passes, though the will be not duly attested, &c.(1)

80. A will disposed of *all the testator's property, of whatsoever name or nature*, and a schedule was indorsed thereupon, showing that the estate was exclusively personal. Held, the will did not *purport* to dispose of lands, and need not be attested.(2)

81. In one case in Massachusetts, the general principle was established, (independently of the statute, which did not apply to the case,) that a will, defective and invalid as to any material part of the estate intended to be disposed of, cannot be allowed as to any other part; especially where children are the devisees and legatees; because each devise, &c., is in some measure a condition of every other. But this decision is now overruled.(3) But in New York, if a part only of the will cannot be executed without defeating the *general intent*, the invalidity of a part will defeat the whole.(4)

82. In order to pass lands, a will must be executed according to the laws of the place where the lands are situated.(5)(a)

83. It is said to have been a common practice in England for a long time, where a title depends upon a will, to prove the execution of it *per testes* in Chancery. But Lord King was of opinion that a will, as well as a deed, might be received on proof of the witnesses' handwriting.(6) The necessity and effect of probate in this country have been already briefly considered. (Ch. 90.)

(1) *Deane v. Littlefield*, 1 Pick. 239.

(2) *Very v. Very*, 3 Pick. 374. See *Den v. Snitcher*, 2 Green, 54.

(3) *Osgood v. Breed*, 12 Mass. 525; 1 Pick. 239. (See *Brown v. Thorndike*, 15 Pick. 388; *Easton*, 6 Paige, 183.)

(4) *Hartun v. Corse*, 2 Barb. Ch. 506.

(5) *Coppin v. Coppin*, 2 P. Wms. 293; *Kerr*

v. Moon, 9 Wheat. 565; *Bradbury v. Doe*, 1 Blac. 372. See *Watkins v. Holman*, 16 Pet. 25; *Potter v. Titcomb*, 9 Shepl. 300; *Mills v. Fogal*, 4 Edw. Ch. 559; *Cornelison v. Browning*, 10 B. Mon. 425.

(6) 6 Cruise, 66; *Colton v. Wilson*, 3 P. Wms. 192. *Fearne's Op.* 234.

(a) In Massachusetts, (St. 1843, 269,) any will, made in any other State or country, conformably to its laws, is valid here. So, in Indiana. St. 1824; *O'Brien v. Woody*, 4 McL. 75. In Missouri, it is provided (St. 1843, 3, 4) that the citizen of a foreign country may devise land situated in that State, by a will conformable to the laws either of the State or of such foreign country. In Arkansas, the same provision is made with regard to citizens of other States or Territories. Rev. St. 769-70. See *Smith, &c.*, 2 Eng. L. & Equ. 598; *Depas v. Mayo*, 11 Mis. 314; *Nicholson v. Leavitt*, 4 Sandf. 252; *Glenn v. Thistle*, 23 Mis. 42.

An inhabitant of Massachusetts, while in the State of New York on a visit, being sick and in apprehension of death, executed an instrument in the presence of two witnesses who attested it at his request, in the following terms: "It is my wish that the will that I made be destroyed, and my estate settled according to law." Before signing his name thereto, the paper was read aloud to the testator, and he was asked if it would answer, to which he replied that it would. Held, this instrument was executed in the manner, and with the formalities prescribed by law, to admit it to probate in the State of New York, as a testamentary instrument or codicil, and therefore, that under the Statute of 1843, c. 92, sec. 1, it might be proved, recorded, and proceeded upon as such in this State. *Bayley v. Lailey*, 5 Cush. 245.

Before 1845, lands in Missouri could be devised, by will executed according to the law of the place where it was made. The act of 1845, changing the law in this respect, is not retrospective in its operation. *Schulenberg v. Campbell*, 14 Mis. 491.

CHAPTER XCII.

REVOCATION OF DEVISES.

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| <ol style="list-style-type: none"> 1. Will, in its nature revocable. 2. Revocation must be in writing—modes of revocation. 3. By subsequent will; whether such will must be an <i>operative</i> one; whether its contents must be known, &c. 8. Second will revokes, only so far as inconsistent with the first; contents of second unknown, &c. 15. Two wills of one date. | <ol style="list-style-type: none"> 16. Revocation of legacies charged upon land. 19. Revocation by <i>codicil</i>. 20. Revocation by subsequent <i>writing</i>. 26 By <i>cancelling</i>, &c. 40. <i>Implied</i> revocations, marriage, &c. 53. Transfer of the land devised, when and how far a revocation; intention to revoke unnecessary, &c.; <i>pro tanto</i> revocation, bankruptcy, &c. |
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1. It is one of the inseparable incidents of a devise, arising from the fact that it does not take effect till after the testator's death,^(a) to be subject to *revocation* during his life. And this is a power of which he cannot deprive himself, even by the express declaration that the will shall be irrevocable.(1)

2. It is said, that as the statute of wills provided merely for the *making* of devises in writing, they might be *revoked*, under that statute, without writing. Thus any act, indicating an intention to destroy the will, was a good revocation. But, by the statute of frauds, no clause of a will can be revoked, except by some will or codicil in writing, or other writing, signed in presence of three or four witnesses; or by burning, cancelling, tearing or obliterating the same, by, or in presence of the testator, or by his direction and consent. Parol declarations of the devisor are inadmissible upon the question of revocation, unless they relate to the *res gestæ*, and show the intent of an act. So the pecuniary circumstances of children, &c., are no evidence upon the question of revocation, as showing the sufficiency of a devise to them or the reverse.(2)

3. A subsequent will revokes a former one, either where it contains an express clause of revocation, or makes a new and incompatible disposition of the property.(3)

4. So the republication of a prior will revokes a later one, where the dispositions are different. (In Pennsylvania, such republication may be by parol. See *Republication of Devise*.)⁽⁴⁾

5. An instrument, intended for a will, but defective in itself or in its execution, is no revocation of a prior will, though containing an express clause of revocation. Nor can it be used for this purpose with-

(1) Bac. Max. 19; Vynior's case, 8 Rep. 208; Doe v. Harris, 8 Ad. & Ell. 1; 82 a; Nan Mickel, 14 John. 324; 9 Cow. Smith v. Dolby, 4 Harring. 350. See Lyon v. Fisk, 1 La. Ann. R. 444.

(2) 6 Cruise, 67; Lawson v. Morrison, 2 Dall. 289; 4 Cow. 483; Jackson, v. Betts, 9

(3) Boudinot v. Bradford, 2 Dall. 268.
(4) Hanard v. Davis, 2 Binn. 406.

(a) "A testament is of force after men are dead; otherwise it is of no strength at all while the testator liveth." Hebrews, ix. 17.

A will is *inchoate*, though not *consummate*, from the execution of it. For many purposes in law, it relates to the time of making it, though it does not take effect till after the testator's death. Martindale v. Warner, 15 Penn. 471.

out probate. Hence, if an instrument offered for probate as a will is disallowed, on the ground of fraud upon and incapacity of the testator, it cannot be afterwards set up as a revocation of a prior will. The incapacity affects the revoking as well as devising part of the instrument.(1) (See sec. 20.) And an unattested will is no revocation of a prior will, though both are inclosed in an envelope, upon which is an indorsement, implying that the latter was meant to supersede the former.(2)(a)

6. But a subsequent devise may operate by way of revocation, if obviously so intended, even though from some *extrinsic* cause it does not take effect as a devise; as, where it is made to a Roman Catholic, or to a corporation, or to the poor of a parish, neither of which devisees was capable formerly in England of taking lands.

7. It has been held, that if a second will contains an express clause of revocation, this clause takes effect immediately, so that the first will is thereby annulled, even though the second is afterwards destroyed. This point, however, has been in other cases denied; and the cancellation of the last will, though containing a clause of revocation, held to revive the first. The turning point of inquiry seems to be, whether or not the testator *intended*, by cancelling the second will, to re-establish the first. It is said, where a second will is destroyed, *without more*, the first is, in general, *ipso facto* revived. But the circumstances of the case, showing an intent one way or the other, must be proved.(3)(b)

8. A second will, or codicil, containing no clause of revocation, revokes the first only so far as inconsistent with it, even though it profess an intention to make a different disposition of the whole estate.

9. Thus, where the first will devises to A in fee, and the second to B for life, paying A a certain rent; A takes the reversion in fee, and B a life interest, subject to rent.(4)

(1) Reid v. Borland, 14 Mass 208; Laugh-ton v. Atkins, 1 Pick. 535; Eccleston v. Speke, Carth. 79; Limbery v. Mason, Com. 451; Hyde v. Hyde, 3 Cha. 155; Onions v. Tyrer, 2 Vern. 742; Ilchester, 7 Ves. jun. 348; Winslow, 14 Mass. 421; Beckett v. Harden, 4 M. & S. 1; Deakins v. Hollis, 7 Gill & J. 311; Taylor v. Taylor, 2 Nott & M'C. 485.

(2) Grantley v. Garthwaite, 3 Russ. 90.

(3) 1 Rolle's Abr. 614; Roper v. Ratcliffe, 10 Mod. 233; James v. Marvin, 3 Conn. 576; 2 Dall. 289; Boudinot v. Bradford, 2 Dall. 268; 2 Yeates, 174; Linginfetter v. Linginfetter, Hard. 119.

(4) Coward v. Marshall, Cro. Eliz. 721. See Lyon v. Fiske, 1 La. Ann. Reg. 444.

(a) Where a codicil, containing a clause of revocation, recites the death of a devisee in the will, who is still living; the revocation is conditional only upon the devisee's death, although the testator subsequently discovers that he is alive. Doe v. Evans, 10 Ad. & Ell. 228.

(b) In Ohio and Arkansas, revocation of a second will does not revive the first, unless the terms of revocation show such to be the intent, or the first is republished. Swan, 998; Ark. Rev. St. 767.

An informal addition to a will, after its execution, will not operate as a statutory revocation, where the additional matter neither bears upon the contents of the will, nor upon its interpretation. Wikoff's Appeal, 3 Harris, 281.

An omission to mention a particular codicil in a clause of republication, in which prior and subsequent codicils are specified, may be an implied revocation of such codicil; but this implication may be rebutted by other circumstances. Ib

A left a will dated in 1845, two codicils dated in 1846, and the unexecuted draft of a will dated in 1842. This last will had been destroyed *animo revocandi*. The first codicil distinctly referred to the contents of the will of 1842, but did not describe that will by date, speaking of it merely as the last will. An allegation was offered, propounding the will of 1845, and the two codicils. Held, the codicils alone were entitled to probate, the will being revoked by the implied revival of the will of 1842. Hale v. Tokelove, 5 Eng. L. & Eq. 574.

10. Devise to A, son of the testator, in fee. The testator afterwards made a codicil, declaring that if A should die without issue male, the real estate should be thus disposed of, viz. : his widow and child should have the use of one half the land during her widowhood, and upon her death or marriage it should be equally divided between the testator's two other children, and A's child or children. A died, leaving a widow and three daughters, but no male child. Held, one-half the land passed under the will to the heirs of A, and the use of the other half, by the codicil, to the widow and children, till the death, &c., of the widow: the will, as to one-half for that period, not being revoked.(1)

11. Upon similar ground, where a verdict finds that the testator made a second will, whose contents are unknown, this is no revocation of the first.(2)(a)

12. And even where the verdict of the jury was, that the testator made a second will *different* from the first, but in what respects they were ignorant; that they did not find any cancellation, or destruction, by the former devisee, of the second will, but knew not what had become of it; it was held by the Court of King's Bench, and the House of Lords, reversing the judgment of the Court of Common Pleas, that the first will was not revoked. In this case, it was contended, in favor of the revocation, that the verdict imported a change in the testator's intention before his death, and, therefore, the former was not his *last will*; that the heir should not be disinherited but by a clear and unexceptionable title, and the devisee, claiming under a derivative, not an original title, had the burden of proof on him, and was bound to produce and show an interest under the second will; that if a second will were held to be no revocation, merely because not produced, this would be holding out the strongest inducement to a devisee to obtain unlawful possession of such will; and that the continuance of the second will must be inferred from its having once existed, and from the declaration of the jury that they did not find it cancelled. On the other side it was argued, that although the second will was found to be *different* from the first, yet, as the nature of this difference was unknown, it might relate to personal estate only, to the appointment of an executor, or the amount of a legacy, and not apply at all to the subject matter of the first devise; that the proposition above stated, in regard to *the last will*, necessarily implied that successive instruments related to *the same property*, and the will prior in time was *the last* in reference to the particular property in question; and that to allow the revocation of one will by another not existing, would virtually repeal the statute of frauds, and also destroy the testamentary power, by rendering every devise, however formal and solemn, wholly insecure, and liable to be set aside by loose testimony.(3)

13. It has been held in Pennsylvania, that the mere fact of making a second will is not a revocation of the first, the contents being unknown,

(1) Brant v. Willson, 8 Cow. 56. (3) Goodright v. Harwood, 3 Wils. 497;
(2) Hungerford v. Nosworthy, Hardr. 374; 2 Bl. R. 937; Cowp. 87; 7 Bro. Parl. 489.
Hichins v. Bassett, 3 Mod. 203; Salk. 592;
Hungerford v. Nosworthy, Show. Parl. 146.

(a) A court of equity may set up a lost will. Gaines v. Chew, 2 How. 619.

and it not appearing to be *in esse* at the death of the testator, but rather the contrary, and that he had cancelled or destroyed it.(1)

14. A power, given by a will and codicil to sell to certain persons at a fixed price, is revoked by a subsequent devise of the land to trustees, to be sold for payment of debts, and subject thereto upon the trusts of the will.(2)

15. Where there are two inconsistent wills of the same date, unless reconciled by some act of the testator, both are void, so far as they disagree.(3)

15*a*. A testator died on the 25th of August, leaving two wills, of the 23d and 24th of that month, of a totally different tenor. The will of the 24th had no words of attestation, the subscribing witnesses having merely signed their names. Held, first, that the evidence rebutted the presumptions, arising against the latter, from the improbability of the two wills on two successive days, and other circumstances. Secondly, that the subscription of the witnesses, without any words of attestation, was a sufficient compliance with St. 1 Vict. c. 26, sec. 9.(4)

16. Where legacies are charged upon lands by a will, only upon failure of the personal estate, as a subsidiary fund; such legacies, and consequently the charge itself, may be revoked by an unattested will or codicil. Whatever takes away the thing secured must necessarily free the security. It seems, however, that if the legacies are primarily charged upon the land, a formally executed will is necessary to revoke, as originally to charge them. In such case, the money to be raised is considered in equity as part of the land, and can only be raised by sale or disposition of the land. It is like a devise of *the profits* of land, which is a devise of the land itself.(5)(*a*)

17. Devise of an annuity, payable from the testator's freehold and personal estate. By an unattested codicil he revoked the annuity. Held, it remained a charge upon the freehold.(6)

18. Devise of lands to be sold, and the produce applied in the same manner as the residue of the personal estate. An unattested codicil, revoking the bequest of the residue, does not revoke the devise.(7)

19. In regard to revocation, there is no distinction between a subsequent will and a *codicil*.(*b*) But a codicil is no revocation, unless the

(1) *Lawson v. Morrison*, 2 Dall. 290.

(2) *Bridger v. Rice*, 1 Jac. & W. 74. See *Duffield v. Duffield*, 3 Bligh, 262; *Duffield v. Elwes*, 2 Sim. & Stu. 544; *Doe v. Hicks*, 8 Bing. 475; *Duffield v. Elwes*, 3 B. & C. 705.

(3) *Phipps v. Anglesea*, 7 Bro. Parl. 443.

(4) *Bryan v. White*, 5 Eng. Law & Eq. 579.

(5) *Hyde v. Hyde*, 1 Abr. Eq. 409; *Brudenell v. Boughton*, 2 Atk. 268.

(6) *Mortimer v. West*, 2 Sim. 274.

(7) *Gallini v. Noble*, 3 Mer. 691.

(*a*) Where a legacy, charged on real and personal estate, is revoked by an unattested will, and the revocation is therefore invalid as to the real estate, the legatee will take in the proportion of the value of the land to that of the personal property. *Stocker v. Harlim*, 3 Beav. 479.

(*b*) A testator devised his real estate to A and B in fee, on certain trusts, and by a codicil appointed C "to be a trustee and executor of his will in the place of A, whom he did not wish to act as executor." Held, the codicil acted as a revocation of the devise made to A by the will. *Hough's Estate*, 6 Eng. Law and Eq. 61.

A left a will and four codicils. The first codicil substituted legacies of stock for money legacies; the second revoked the appointment of an executor and trustee, and named another person as executor and trustee in his place; the third gave legacies to the executors and trustees appointed by the will and second codicil; the fourth directed the sale, by the executors and trustees named in the will, of an estate devised by the will, and the investment

intent distinctly appears. It is said, that to revoke a clear devise the intention to revoke must be as clear as the devise.(1)

20. A second mode of revocation, is by *writing*, signed in presence of three witnesses, and expressing an intention to revoke. Such writing is not required, like a subsequent will, to be attested by the witnesses in presence of the testator. But, as has been seen, (sec. 5,) where an instrument, in the form of a will, and containing also a clause of revocation, is invalid as a will for want of attestation, it cannot operate as a revocation, because it is obviously the intention of the testator to revoke the former will in no other way, than by substituting another perfect will in its place. More especially is this the case, where both wills make substantially the same dispositions; as, where the second appoints new trustees, but declares the same trusts.(2)

21. In Pennsylvania, it is held that the same formalities are required for the revocation as for the making of a devise.(3)

22. In Connecticut, it has been held that a revocation need only be in writing, and may be proved like other instruments. Thus, an indorsement upon the will as follows: "this will is invalid, March 19, 1813, as A has agreed that my wife shall claim no right of dower," is a good revocation. By statute, revocation must be by will or codicil, signed in presence of the witnesses, and attested in presence of the testator. In Vermont, by will or codicil. In Ohio, Michigan, Kentucky, Arkansas, Mississippi, Pennsylvania and Massachusetts, by will, &c., or other instrument, duly attested. In North Carolina, the same, and also by a will, &c., found as above stated. In Virginia, a will once revoked can be revived only by re-execution.(4) (Ch. 91, sec. 13.)

23. But, in Kentucky, an indorsement upon a will as follows: "this will is intended to be altered, and will be—time is given," is no revocation, as it merely expresses the intention to alter the will at a future day.(5)

24. In North Carolina, independently of later statutory provisions, it has been suggested, that a parol revocation is invalid.(6)

25. It has been seen, that in the case of a *will*, an acknowledgment by the testator of his signature, in presence of the witnesses, is equivalent to an actual signing. But it seems to be otherwise in England, with a mere instrument of revocation; the words of the statute, "by a will or codicil, &c., or by a writing signed before three witnesses," being construed as applying the four last words exclusively to a *writing*, not to a *will*, &c. Thus, a statement indorsed upon the will, and signed by three witnesses in presence of the testator, setting forth that he had

(1) Griffiths v. Grieve, 1 Jac. & W. 31; 8 Bing. 475. See Brown v. Lawrence, 3 Cush. 390.

(2) Egglestone v. Speake, 1 Show. 89; 3 Mod. 258; Onions v. Tyrer, 1 P. Wms. 343; 2 Vern. 741.

(3) Lawson v. Morrison, 2 Dall. 289; Boudinot v. Bradford, 2 Yeates, 170.

(4) Witter v. Mott, 2 Conn. 67; Con. St. 336; 1 Verm. L. 336; Ohio St. 243; Mich. Rev. St. 271; 2 Ky. L. 1539; Missi. Rev. C. 32; Mass. Rev. St. 417; Park & J. 468; Swan, 998; Virg. Code, 516.

(5) Ray v. Walton, 2 Marsh. 71.

(6) Giles v. Giles, Cam. & Nor. 174.

published and declared in their presence that certain devises should be void ; but not signed by the testator—is not a valid revocation.(1)

26. A third mode of revocation, is by *cancelling*,(a) which means destroying, defacing or obliterating the will. But the effect of this act depends upon *the intent* with which it is done. An actual obliteration of the will, if accidental, and not designed, is no revocation. Thus, if a testator should throw ink upon the paper instead of sand, so as entirely to deface it ; or, having two wills, should direct a third person to cancel one, and he should cancel the other ; or, having duplicate instruments, should unintentionally burn one of them ; these acts would be no revocation. So, a man who is incompetent to make, is equally incompetent to revoke a will ; and his destruction of such will, when so incompetent, is not a revocation. So, a will destroyed by the heir, was admitted to probate, on proof of its contents, by one witness, and the production of a rough draught, the proof of the execution being full. So, the deceased duly executed his will in 1846 ; in 1850, circumstances occurred which rendered this will inoperative, except as to a legacy of £100 ; and in December he drew a pen across the will, and wrote at the top of each sheet, “cancelled ;” and also, at the end of the will, he wrote, “cancelled by me, this first day of December, 1850.” Probate was allowed. So, where a testator ordered his son to throw his will into the fire, and the son, to deceive his father, threw in another paper and kept the will ; held not to amount to a revocation. So, where the several sheets of a will were sealed, and the testator, having made and signed a new one, tore off the seals from the first eight sheets, and, on being told by the scrivener that the new will had not been legally perfected, expressed regret, desisted from the act of tearing, and left the seal upon the last sheet, and died before completing the new will ; this was held to be no revocation, because no seal was probably necessary, certainly not more than one ; and the intention to revoke was wanting ; that is, the testator meant to revoke the first will, only by substituting the second ; to which purpose the cancellation was merely incidental, indicating his belief that he had made a new will.(2) (See sec. 32.)(b)

(1) *Ellis v. Smith*, 1 Ves. 12 ; *Hilton v. King*, 3 Lev. 86. | *Eq.* 409 ; *Onions v. Tyrer*, Prec. Cha. 459 ; 1 P. Wms. 344, n. 1 ; *Fary, &c.*, 9 Eng. L. & Equ. 600 ; *Hise v. Fincher*, 10 Ired. 139 ;

(2) *Burtenshaw v. Gilbert*, Cowp. 52 ; 4 Cow. 483 ; *Burns v. Burns*, 4 S. & R. 567 ; *Johnson v. Brailsford*, 2 Nott & M'C. 272 ; *Jackson v. Holloway*, 7 John. 399 ; *Legare v. Ashe*, 1 Bay, 464 ; *Hyde v. Hyde*, 1 Abr. | *Short v. Smith*, 4 E. 419 ; *Brown*, 1 B. Monr. 57 ; *Locke v. James*, 11 Mees. & W. 901 ; *Smith v. Wait*, 4 Barb. 28.

(a) In South Carolina, the word used in the statute of wills is *destroying*, but the meaning is the same as that of the expression, “burning, cancelling and tearing,” in the English act. *Johnson v. Brailsford*, 2 Nott & McC. 272. In Arkansas, if the cancelling is done by a third person, for the testator, it must be proved by two witnesses. Ark. Rev. St. 764. In Ohio, cancellation of a will does not revive a former one. Sts. 1852, 262.

(b) Where a testator cancels a former will upon the presumption that a later one is duly executed, when it is not, the former shall be set up against the heir in a court of equity, and the devisee relieved, upon the ground of *accident* ; or, perhaps, more properly, of *mistake*, or a conditional presumptive revocation, where the condition has failed. 1 Story on Equ. (3d ed.) 115. In order to set up an unrevoked, but lost or destroyed will, evidence of its whole contents must be very clear and satisfactory. *Davis v. Sigourney*, 8 Met. 487. *Durfee v. Durfee*, 490, n.

27. The statute requires that cancellation of a will, in order to revoke, be done by the testator himself, or in his presence, and by his express direction. Hence, where a brother of the heir snatched the will from the executor, and tore it into small fragments, most of which were collected and re-united, including the devise in question; the will was established in Chancery.(1)

28. On the other hand, where there is an intention to revoke, slight acts of cancellation are sufficient. Revocation is an act of the mind, which must be demonstrated by some outward, visible sign or symbol; but the latter need be but very trifling, to produce the effect. The statute mentions *burning* and *tearing* as two modes of revocation; and both these acts, done only in a slight degree, will effect the object.(2)

29. A, the testator, somewhat ripped his will, and nearly tore a small piece from it, and then threw it on the fire. It fell off, and B, being in the room, took it up and put it in her pocket; but for which it would have been burnt. A, suspecting the truth, afterwards expressed his intention to destroy the will, and bade B to do it. B gave him to understand that it was destroyed, and A so declared. He afterwards wrote to C to come to him, intimating his desire to make another will; but died without doing it. Held, the burning and tearing were a sufficient revocation.(3)

30. A testator, having quarrelled with one of the devisees, began to tear the will in a passion, intending to destroy it, but, having torn it into four pieces, was stopped by the interposition of the devisee and of a third person. He then became calm, put by the fragments, and expressed his satisfaction that no material part was injured, and that it was no worse. The jury found that he had not done all he intended towards destroying the will. Held, this was a proper question for the jury, and the verdict must stand.(4)

31. The obliteration of a part of a will, like any other partial revocation, revokes it only *pro tanto*. Hence no republication is necessary, to render valid the part not obliterated. A partial obliteration cannot be taken to have been done *animo revocandi*, or with the intent to republish the will, even though the testator procures it to be written anew, but dies before the new writing is brought to him.(5)

32. So a devise to trustees is not revoked by altering, obliterating, and interlining different parts of the will. Upon the same principle, where there are two trustees, the erasure of the name of one is no revocation as to the other. If they were to take as joint tenants, the remaining trustee takes the whole, not by a *new gift*, which would require republication, but simply *by the revocation itself*. If as tenants in common, then he takes only one-half the estates. So where there are two trustees, the erasure of one, and substitution of a third, are no revocation as to the trusts of the will, or as to the other original trustee, it being the evident intent, not to admit the heir, but only to change the trustee, and to revoke the will, if at all, not by cancelling, but by substituting another devise, which does not take effect.(6) (See s. 26.)

(1) Haines v. Haines, 2 Vern. 441.

(2) Gains v. Gains, 2 Marsh. 190; 4 S. & R. 567; 2 Nott & M'C. 272.

(3) Bibb v. Thomas, 2 Bl. R. 1043.

(4) Doe v. Perkes, 3 Barn. & Al. 489.

(5) Burkitt v. Burkitt, 2 Vern. 498; 4 E. 419.

(6) Sutton v. Sutton, Cowp. 812; Short v. Smith, 4 E. 419. (See Dyer; 310 b.*)

* In this case, the testator was murdered by the devisee.

32 *a*. The deceased duly executed her will, using the name "Higgins" in the body of the will and in the signature. Subsequently the writer of the will, by her directions, erased the name "Higgins," and substituted that of "Redding," and the deceased re-signed the will, using the name "Redding;" but there was no re-execution. Held, in the absence of intention to revoke, the will was entitled to probate, as originally executed.(1)

32 *b*. Where the signature of the testator, and the subscription of the witnesses, are made in the margin of the will, near the alterations, the court will decree probate of the will, with the alterations, without requiring any affidavit as to the time when the alterations were made.(2)

33. A testator made a will, to which he afterwards annexed a codicil. He then made a new will, and annexed to it a *postscript*, by which he "revoked all former wills," and signed the postscript. The second will was afterwards cancelled, by cutting his name from the body of it, but leaving the postscript, with his name annexed. This paper, and also the first will, were carefully preserved by him, and both found after his death. Held, the postscript was in itself a revocation of the first will, and was not necessarily cancelled by cancelling the second will, so as to revive the first.(3)(*a*)

34. Proof that a testator, having made a will, took papers from his desk where his valuable papers were kept, and burnt them, is not admissible as evidence of revocation, even though the will is not to be found at his death.(4)

35. If the testator tear off the seals, interline, &c., *animo revocandi*, though afterwards intending to make another will, which intent he never executes; the will is still revoked.(5)

36. Where erasures and interlineations are made, for the purpose of including lands acquired since the making of the will, and a memorandum to the same effect is indorsed upon the will, but not duly attested, the after-acquired lands do not pass, but the will is not revoked.(6)

36 *a*. An alteration or interlineation in a will is presumed to be made after its execution; and the party claiming under the will is bound to rebut this presumption.(7)

36 *b*. For this purpose, evidence is admissible of the testator's declarations, prior to the will, that he intended to provide for the party in whose favor the alteration is made.(8)

36 *c*. In a will were erasures and interlineations in the handwriting of the testator. Held, in the absence of evidence, they must be considered as made after execution of the will, and void as to the real estate.(9)

37. A will was written upon three sides of a sheet of paper, duly attested, and concluded by saying that the testator had signed the two

(1) Redding, &c., 1 Eng. Law and Eq. 624.

(2) Wingrove, &c., 1 Eng. Law and Eq. 625.

(3) Bates v. Holman, 3 Hen. & M. 502.

(4) Jackson v. Betts, 9 Cow. 208.

(5) Johnson v. Brailsford, 2 Nott & M'C.

272.

(6) Jackson v. Holloway, 7 John. 394.

(7) Shallcross v. Palmer, 6 Eng. L. & Equ. 155.

(8) Ib.

(9) Simmons v. Rudall, 2 Eng. L. & Equ.

97.

(*a*) A will having been made in 1828, upon the same paper, in 1833, the testator wrote a codicil. Upon the margin of the will was written the word "obsolete." Held, no revocation. Lewis v. Lewis, 2 Watts & S. 455.

first sides, and signed and sealed the last. The latter part of the statement was true, but not the former. He afterwards altered the will, made a fair copy of it, and added one interlineation; but the copy was not executed. The will and copy were found locked in a drawer at his house. Held, the will was valid, and there was no revocation of it, the facts merely showing an unexecuted intention to make a new will.(1)

38. Where it is proved that a second will has been made, the non-production of it is only *prima facie* evidence that it was cancelled, and the contrary may be shown by parol evidence; so as to render it effectual as a revocation of the former will. Such evidence is not admissible, where the will was designedly destroyed.(2)

39. Duplicate copies of a will constitute in law but one will. Hence, if the testator, having possession of only one copy, cancel it, this revokes the whole.(3)

40. It has been stated in the former volume, (pp. 310-18,) that the provisions of the statute of frauds as to *trusts* do not preclude the setting up of *implied* trusts, as before the statute. Upon a principle somewhat similar, the modes of revoking a devise, prescribed by the statute, merely exclude other forms of *express* revocation, and certain *implied* revocations are still allowed, which remain to be noticed.(4)

41. Marriage of the testator, and the birth of a child, revoke a devise.

42. And the principle has been applied where, at the making of the will, the testator had a wife, who afterwards died without having children, and he married a second time, and had children. So also, where the testator, having married and had a child after making his will, made a new one, devising his real and personal property to the wife in trust for the child, but not duly attested; it was held, that though the second will could not revoke the first as to the real estate, the marriage, &c., constituted an implied revocation. So where, upon his wife's becoming pregnant, a testator expressed his intention to make a new will, and directed his attorney to write it, but died before it was prepared; held, upon the death of a posthumous child,(b) the will was revoked.(4)

43. The two last cases show, that an *implied* revocation is not negated by an ineffectual attempt to make an *express* revocation. In this respect, a distinction is to be observed between the mode of revocation now under consideration, and those heretofore considered, by a *writing* ineffectually designed for a new will, (sec. 5 & seq.,) and by *cancelling*, accompanied with the preparation of another will, which fails to take effect. (Secs. 26-32.)

(1) Winsor v. Pratt, 5 Moo. 484.

(2) Legare v. Ashe, 1 Bay, 464. (See Smith v. Carter, 3 Rand. 167; 6 Wend. 173.)

(3) 2 Vern. 742; 1 P. Wms. 346.

(4) Christopher v. Christopher, 4 Burr. 2182; Spragge v. Stone, Doug. 35; Amb. 721; Doe v. Lancashire, 5 T. R. 49.

(a) By a late English statute, (1 Vict. ch. 26, secs. 19, 20, 23,) no revocation shall be allowed upon the presumption of intention arising from change of circumstances; and no act, done after the making of the will, except a revocation, shall prevent its operation upon such property as the testator has at his death; and the will shall be construed to speak at the time of his death. Farrar v. Winterton, 5 Beav. 1.

(b) In this and other cases, such child was held to stand in the same situation with other children, as by the civil law.

44. Lord Mansfield remarked, that there had been no case allowing such revocation, unless the whole estate was disposed of. And the principle does not apply, where the will provides for the wife and children, though not *as such*; as where, after legacies to other persons, the testator devised lands to A and her heirs, and afterwards married A, and died leaving her *enceinte*. So where the wife and children are provided for by settlement, and there are children by a prior marriage, the rule does not apply. But a provision for the wife alone, not for the children, is insufficient. So the descent upon the children of after-purchased land, it seems, will not prevent a revocation; certainly not, if they take a mere legal, without any beneficial, interest.(1)

45. Devise to a trustee, in trust, to pay an annuity to A, and to support and raise a sum of money for any children which the testator might have by A. At the making of the will, he had one such child, and afterwards married A, and had three others. Held, the will was not revoked.(2)

45 *a*. The testator, having children by a former marriage, in contemplation of a second marriage, conveyed his real estate in trust for his children, or for such uses as he should by will direct, and his intended wife released all claim of dower. On the same day, the intended wife conveyed her property in trust for her heirs, and the testator released all his claim, as future husband, thereto. The day following, the testator made his will, and two days thereafter the parties married. Held, the marriage did not revoke the will.(3)

46. With regard to the precise ground upon which this doctrine of implied revocation rests, some authorities place it upon the foundation of an *implied condition* originally existing in the will itself; and others, upon a presumed change of intention arising from the subsequent change of circumstances.(*a*) The question is of little practical consequence, except as having some bearing upon the admissibility of parol evidence to rebut the presumption. Mr. Cruise says,(4) "these facts only afford a presumption that the testator had *changed his intention*; so that where this presumption is rebutted by other circumstances, the rule will not hold." Lord Mansfield says,(5) "as marriage, &c., only amount to an *implied* revocation, they may be rebutted even by parol evidence." On the other hand, Judge Buller says, "the changes in the testator's family *raise a presumption* of revocation, to answer which the court receive parol evidence."(6) Lord Kenyon took the ground of a tacit condition annexed to the will.(7) This construction he considered as sustained by the fact, that the birth of a *posthumous* child satisfies the requisition of the law. And, in connection with the same principle, he held, that although the statute of frauds did not exclude *circumstances*, not liable to prevarication, yet it did exclude mere *declarations* of the testator himself. In another case, the court seems to recognize both

(1) *Brady v. Cubitt*, Doug. 31; *Brown v. Thompson*, 1 Abr. Eq. 412; *Ilchester*, 7 Ves. 348; *Marston v. Roe*, 8 Ad. & Ell. 14.

(2) *Kenebel v. Sraffton*, 2 E. 530.

(3) *Wheeler v. Wheeler*, 1 R. I. 364.

(4) 6 Cruise, 82-3.

(5) *Brady v. Cubitt*, Doug. 31.

(6) *Goodtitle v. Otway*, 2 H. Bl. 516.

(7) *Doe v. Lancashire*, 5 T. R. 49; acc. Ark. Rev. St. 764.

(*a*) In North Carolina, the marriage of a man or woman revokes a will. But not upon the presumption of a change of intention. St. 1844-5, 128.

the above principles as proper grounds for the rule. But, in a late case, it is placed distinctly upon the ground of an implied condition, which precludes all evidence of subsequent intention, unless the will be republished.(1)(a)

47. It seems, neither marriage nor birth of children alone will revoke a will. Thus, the case of *Kennebel v. Scrafton*, (sec. 45,) was decided in part upon the ground, that the testator had one child at the making of the will, though he married and had others afterwards. So where the testator, having a son and two daughters by a deceased wife, devised all his estate in trust for them, and afterwards married again, and had other children; held, there was no revocation, for this would give the whole estate to the eldest son, while the will admitted the other children to a share.(2)(b)

48. A person made his will, after marriage, devising lands to his niece, and died leaving his wife *enceinte*, which was unknown to him. Held, the birth of the child did not revoke the will.(3)

49. Where a will devises to lawful children and also an illegitimate child, it is not revoked by a second marriage, and the birth of issue, if the second wife has *aliunde* other lands settled on her and her issue, and if the testator had full knowledge that such will existed.(4)

50. The presumption of revocation arising from marriage, &c., may be rebutted by a subsequent codicil, expressly referring to the will.(5)

51. In this country, the above principles have been subjected to various modifications in the different States. In Maine, Vermont, New Hampshire,(c) Massachusetts, New Jersey,(c) Pennsylvania, Delaware, Ohio, Kentucky, Mississippi, Michigan,(c) Arkansas, Virginia, North Carolina and Alabama, a posthumous child, and in all those States except Alabama, children born after the making of the will, in the parent's lifetime, inherit as if he had died intestate, unless provided for by the will,(d) or otherwise,(e) or particularly noticed in the will, (except in Pennsylvania,) or unless an intent appears to the contrary. In Maine, New Hampshire, Massachusetts,(f) Arkansas and Vermont,

(1) *Kennebel v. Scrafton*, 2 E. 530; *Marston v. Roe*, 8 Ad. & Ell. 14.

(2) 2 E. 530; *Wilkinson v. Adam*, 1 Ves. & B. 465; *Sheath v. York*, 1 Ves. & B. 390; *Yerby v. Yerby*, 3 Call. 289.

(3) *White v. Barford*, 4 M. & S. 10. See 1 Phil. 447.

(4) *Johnson v. Wells*, 2 Hegg. 561.

(5) *Gibbens v. Cross*, 2 Add. 455.

(a) Revocation of a will by marriage, under the Statute of Rhode Island, is presumptive only, not absolute; and evidence of the acts of the testator, and circumstances showing clearly an intention that the will shall stand, ought to be admitted. *Wheeler v. Wheeler*, 1 Rhode Island, 364.

Evidence of parol declarations is not admissible, to rebut the presumption of revocation of a will of personal, as of real estate. *Ib.*

(b) A testator devised an estate to his wife for life, remainder in fee to his nephew, with a proviso, that if the wife should at his decease be pregnant, the devise to the nephew was to cease, and such child take the remainder in fee. At the time of making his will, the testator had no child, and was expecting to die; but a child was afterwards born in his lifetime, and he made a codicil, devising after-acquired property to such child. The wife was not *enceinte* at the death of the testator. Held, the child had no estate under the will, and the devise to the nephew took effect. *Blakiston v. Haslewood*, 2 Eng. Law and Eq. 308.

(c) *Lineal descendant, or issue.*

(d) In Alabama, Pennsylvania and Ohio.

(e) In New Hampshire, New Jersey, Delaware, Kentucky, Michigan, North Carolina, and Arkansas.

(f) In Massachusetts, if a child has no legacy, the presumption is, that he was unintentionally overlooked, and, to take a case out of the statutes, this presumption must be rebutted by other parts of the will. *Tucker v. Boston*, 18 Pick. 162.

the same relief is extended to all children and their issue or legal representatives, unprovided for by will, and unadvanced, unless, in the three first States, the omission in the will appear intentional.(a) In Connecticut, an after-born child revokes the whole will. So in Delaware and New Jersey, if none before, and not mentioned, though posthumous. In Georgia, marriage, or a child unprovided for, revokes *pro tanto*. In Ohio, Indiana and Illinois, birth of a child avoids the will. In South Carolina, the interference with the will applies to posthumous children. In Virginia, Mississippi and Kentucky, birth of a child after the will, if the testator had none before, revokes, unless the child die sole or a minor. In Virginia, marriage revokes in all cases, except the exercise of a power of appointment, in default of which the estate would not pass to the testator's heirs. In Ohio, marriage does not revoke. In New York and Arkansas, if the will disposes of the whole estate, marriage, and the birth of issue before or after the testator's death, revoke, if the wife or issue be living at his death; unless the issue are provided for by will or settlement; or, in New York, the will shows an intent not to make any provision. In Arkansas, no evidence can be received against such revocation. In Ohio, a child absent, and reported to be dead, takes like one after-born.(1)

52. The will of a woman is revoked by her subsequent marriage. Whether it revives with the death of the husband, seems to be somewhat doubtful; but the prevailing modern doctrine is, that it does not. In New York, the language of the Revised Statutes is held to bear the same meaning.(2)(b)

53. Any alteration of the testator's estate in the lands devised, or a part of them, revokes the will, wholly, or *pro tanto*.(c) If the testator

(1) 4 Kent, 525-6; Ind. Rev. L. 274; Conn. St. 227; Verm. Rev. St. 257; Ohio Walk. 342; Illin. L. 615; Church v. Crocker, 3 Mass. 21; Tomlinson v. Tomlinson, 1 Ashm. 224; Swan, 907-8; Ark. Rev. St. 764-6; N. H. Rev. St. 311-12; Virg. St. 1840, 48-9; Cude, 516; Shelby v. Shelby, 1 B. Monr. 269; Raburn v. Shortridge, 2 Blackf. 480; Conn. St. 1852, 262.

(2) Forse v. Hembling, 4 Rep. 61; Brett v. Rigden, Plow. 343 a; Hodsdon v. Lloyd, 2 Bro. 534; Reeve's Dom. Rel. 161; 2 N. Y. Rev. St. 64. So in Pennsylvania, Park & J. 468; and see Ark. Rev. St. 766.

(a) In Massachusetts, such intention may be proved by parol evidence. Wilson v. Foster, 6 Met. 400.

(b) The will of a wife, made under a power, is not revoked by the husband's death. Morwan v. Thompson, 3 Hagg. 239.

(c) Devise to the testator's wife of the use of a house. The testator afterwards made a lease of the house, which lasted beyond his life. Held, if he received rent in advance for the period beyond his death, it was a revocation *pro tanto*; and if the wife failed to receive the subsequent rents, she had no claim for them upon the estate. Wiggin v. Swett, 6 Met. 194.

A grant in fee, reserving rent, with a clause of re-entry, is a revocation of a prior devise. Herrington v. Budd, 5 Denio, 321.

Devise of one estate to A, charged with legacies, and of another to B, charged with other legacies. The testator sold the former estate, and part of the price was paid to A, who after the testator's death paid or tendered all the legacies charged upon him. Held, the sale revoked the will only *pro tanto*. Marshall v. Marshall, 11 Penn. 430.

A mortgage of the property devised is only a revocation *pro tanto*. McTaggart v. Thompson, 2 Harr. 149.

When a testator sells lands devised, and takes a bond and mortgage for a part of the price, it is a revocation of the devise; nor will the devisee be entitled to the bond and mortgage. Beck v. McGillis, 9 Barb. 35.

When a bond and mortgage, specifically devised to C, are foreclosed by the testator in his lifetime, and, on the foreclosure sale, purchased by D, who executes to the testator a new bond and mortgage; the latter will not pass to the devisee, though a writing is found among

convey them away, this proves a *change of intention*; and moreover he does not *die seized*, as the law requires for an effectual devise. So, where, after a devise for life, the will gives the land to trustees to sell, and disposes of the proceeds, a sale by the testator himself revokes both devises alike.⁽¹⁾

54. In equity, a mere covenant or agreement to convey the lands devised revokes the will, if made for valuable consideration; as, for in-

(1) *Sparrow v. Hardcastle*, Amb. 224; 3 Stew. & Por. 286; *Adams v. Winne*, 7 Paige, Atk. 799; 1 Rolle's Abr. 615-16; *Arnald v. Ward*, 15 Pick. 511. *Arnald*, 1 Bro. 401. (See *Hogan v. Bell*, 4

the testator's papers, declaring that, being for the same debt as the first bond, it is given by his will to C. *Ib.*

A conveyance, made subsequently to a devise, is not a revocation, or satisfaction, of a devise of other lands to the grantee. But, if the conveyance be of a portion of the same land, it is a revocation *pro tanto*. *Arthur v. Arthur*, 10 Barb. 9.

Where land is devised to several persons in fee in undivided shares, a subsequent conveyance by the devisor, to one of the devisees, of a part of the same land, will not revoke, or be considered a satisfaction of, the devise to the grantee; but he is entitled to the land conveyed by deed, and to a share in the land remaining, under the will; although there was a mutual mistake as to the effect of the deed, both parties supposing the land conveyed to be in lieu of the share given to the grantee by the will. *Ib.*

Where A made a will, devising all his real and personal property to certain devisees, and afterwards sold all his real estate and conveyed the same; this sale was held to be a revocation of the will, as to the real estate only. *Balliet's, &c.*, 2 Harris, 451.

A devise of a farm, to the son of the testator, in consideration of labor and service, if the farm be of value equal to such labor and service, will be a good defence to an action by the son, for labor and service, against the testator's executors, unless such devise be revoked. A subsequent conveyance of the same farm from the father to the son by deed will amount to such a revocation. *Rose v. Rose*, 7 Barb. 174.

In 1841, A made his will, and devised an estate for life to his wife, from the crops to be raised on the farm on which he then resided. To his son B he devised a tract of land on which the son resided. To his son C he devised all the rest and residuary part of the tract or tracts of land of which the testator was in possession, and on which he then (now) resided, and everything (personal,) wheresoever found upon the premises, intended to be devised, provided that he, C, should grant unto the testator's widow an ample and comfortable support during her life. To his son B he gave an estate in trust for his daughter D. In 1844, the testator conveyed his whole estate in trust to pay debts, and afterwards, to pay over to him all moneys which remained in the hands of the trustee, or to reconvey to the testator all such portions of real and personal property as might remain unsold. The trustee sold the whole estate under the deed, and paid the surplus in money, which, in fact, was the proceeds of the personality, to the executor of the testator. Held, that the executor, after payment of debts, &c., was bound to pay the balance in his hands to the son, C, and that the deed of trust was not a revocation of the will in reference to C's interest in the surplus. *Shilling v. Shilling*, 6 Gill, 171.

A testator mortgaged an estate in fee, and afterwards paid off the mortgage-money, and the estate was reconveyed to him to uses to bar dower. Shortly afterwards, in April, 1811, the testator again mortgaged this estate, and the proviso upon redemption was, that the estate should be reconveyed to the testator, his heirs, appointees or assigns, or to such other person or persons, to such uses and in such manner, as he or they should direct. In the May following the testator made his will, and devised all his messuages, lands, tenements and hereditaments, and all other his real estate whatsoever, or which he had contracted to purchase, or in which he or any other person in trust for him was seized or entitled for any estate of freehold and inheritance, or of freehold only, in possession, reversion, remainder, or expectancy, or which he had power to dispose of by his will, to a trustee, to certain uses and upon certain trusts therein mentioned. In December, 1813, the testator paid off the mortgage, and took a reconveyance of the estate to the common uses to bar dower. Previously to the date of the will, the testator had contracted to purchase another estate, which was subsequently conveyed to him to uses to bar dower. Held, that the will was revoked as to the mortgaged estate, and the estate contracted to be purchased before the date of the will, by the reconveyance of the mortgaged estate and the conveyance of the purchased estate to uses to bar dower. *Plowden v. Hyde*, 9 Eng. Law & Eq. 238.

Held, also, that the testator's heir, who claimed these estates by descent, was not put to his election. *Ib.*

stance, a covenant to settle them upon a daughter, in consideration of her marriage. And even a devise to a wife has been held to be thus revoked.(1) (See sec. 65.)

55. A covenant for *partition* has the same effect.(2)

56. In these cases, the devisee takes the legal estate, but is bound to convey it according to the contract.(3)

57. Even where an intended conveyance is inoperative from some informality, as in case of an appointment to uses, or a feoffment void for want of livery, or a bargain and sale for want of enrolment, it may still revoke a prior devise. So where a contract is abandoned by the proposed purchaser, it still operates as a revocation.(4) (*At law*, otherwise).(5)

58. So a conveyance revokes the will, though the testator does not intend to part with the land, and takes back the same estate; because his seizin is interrupted, and a revocation was intended. As where he conveys to a trustee, and takes back the old use. So where A, after making his will, contemplating marriage with B, conveyed to trustees in trust for himself and his heirs till marriage, then in part to the use of B, and never married; held, a revocation of the will.(6)(a) More especially does this principle apply, where the testator alienes the land *upon the death of the devisee*, and takes back the same estate.(7) So where a testator conveys to trustees in fee, in trust for himself for life, directing them to convey according to his future appointment, which he fails to make; although a trust results to him, the devise is revoked. (But see sec. 64.) So where, after a devise, a fine is levied, without declaring any use; this is a revocation, though the testator takes back the old use.(b)

59. Even a conveyance to the devisees, and made expressly to confirm or give effect to the devise, has been held to be a revocation, because it interrupts the seizin. So, although the deed is afterwards cancelled, the devise will not take effect without republication.(8)

60. A devised land, and afterwards conveyed it to the uses of the will. Held, a revocation.(9)

61. So, where one covenants to levy a fine to such uses as he shall

(1) *Rider v. Wager*, 2 P. Wms. 328; *Knollys v. Alcock*, 7 Ves. 558; *Cotter v. Lajer*, 2 P. Wms. 622; *Walton v. Walton*, 7 John. Cha. 258.

(2) *Knollys v. Alcock*, 5 Ves. 648; 16 Ves. 519.

(3) 2 P. Wms. 626.

(4) 1 Rolle's Abr. 615; *Car v. Ellison*, 3 Atk. 73; *Sparrow v. Hardcastle*, 803; *Shove v. Pincke*, 5 T. R. 124; *Vawser v. Jeffery*, 2 Swans. 268; *Tebboitt v. Voules*, 6 Sim. 40; *Walton v. Walton*, 7 John. Cha. 258.

(5) *Hall v. Bray*, Cox, 212.

(6) *Lincoln's case*, 1 Abr. Eq. 411; *Show*.

Parl. 154; *Sparrow v. Hardcastle*, 3 Atk. 803.

(7) *Putbury v. Trevillian*, Dyer, 143 b.

(8) *Pollen v. Hubbard*, 1 Abr. Eq. 412; *Hubbard v. Hubbard*, 7 Bro. Parl. 433; *Parsons v. Freeman*, 3 Atk. 741; *Dister v. Dister*, 3 Lev. 108; *Marwood v. Turner*, 3 P. Wms. 163; *Darley v. Darley*, Amb. 653; 3 Wils. 6; 3 Bro. Parl. 359; *Doe v. Dilnot*, 2 B. & P. N. R. 401; 7 John. Cha. 258; *Kean*, 9 Dana, 25; *Bullin v. Fletcher*, 2 My. & G. 432.

(9) *Hussey's case*, Moo. 789; 1 Rolle's Abr. 614.

(a) The case went to the House of Lords, and the judges were said to be equally divided upon it. Lord Mansfield afterwards remarked, "the absurdity of Lord Lincoln's case is shocking; however, it is now law." *Gulliver v. Ashby*, 4 Burr. 1940. In language equally homely, Lord Hardwicke remarked that a revocation by a fine, in which no uses are declared, was "a proligious strong case." *Parsons v. Freeman*, 3 Atk. 748.

(b) Where a testator, after the making of the will, purchases land included in a general description of the will; this is no revocation. *Blandin v. Blandin*, 9 Verm. 210.

appoint by will; afterwards makes a will; and then levies the fine: the will is revoked. (But, in such case the will is a good declaration of the uses of the fine.)(1)

62. A husband covenanted, before marriage, to make a certain settlement in favor of his wife; afterwards by will confirmed the articles, and made certain dispositions of the land; and subsequently executed a settlement, purporting to be in pursuance and performance of the articles, but in many points inconsistent with them^(a) and the will. By this settlement, he conveyed the whole estate, which he had in the lands at the making of the will, to others in fee, with a use to himself for life, and limitations thereon, and the ultimate use to himself in fee. It was contended, that the settlement did not revoke the will; upon the grounds, that the settlement was in fact but a part of the articles, which were prior to the will, and the testator must have had the settlement in view when he made the will; that the plain object of the settlement was, not to revoke the will, but to carry the articles into effect; and that the will expressly referred to the articles, and devised only such estates as were not bound thereby.^(b) But the settlement was held to be a revocation of the will.⁽²⁾

63. So, where a settlement, made in execution of marriage articles, limited prior uses to third persons, and the reversion in fee to the settler, his heirs and assigns; it was held by Lord Kenyon, that such settlement was a revocation of a will made between the articles and the settlement, as much as it would have been if it had limited the estate merely to the use of the settler in fee, with no other uses.^{(3)(c)}

64. It has been held in Virginia, that a devise is not revoked by a subsequent conveyance of the land to trustees in fee, in trust for the grantor for life.⁽⁴⁾ (See sec. 58.)

65. A court of equity cannot adopt different rules respecting the transmission of estates, from those established at law. Hence, the same conveyance, which would revoke a devise of a legal estate, equally revokes the devise of an equitable estate; and equity will not set up a revoked legal devise, against the heir, in favor of the devisee, or declare the former a trustee for the latter. It has been said, that this would be in effect to convert what was a legal, into an equitable devise, merely because it was revoked, and therefore of no force as a legal devise.^{(5)(d)} (See sec. 54.)

(1) *Lutwich v. Mitton*, 1 Rolle's Abr. 614; *Hick v. Mors*, Amb. 215; *Lock v. Foote*, 5 Sim. 618. (See *Vawser v. Jeffery*, 3 B. & A. 462.)

(2) *Brydges v. Chandos*, 2 Ves. 417; 7 Bro. Parl. 505; (*Livingston v. Livingston*, 3 John. Cha. 155.)

(3) *Goodtitle v. Otway*, 7 T. R. 399; 1 Bos. & P. 576.

(4) *Hughes v. Hughes*, 2 Munf. 209.

(5) *Brydges v. Chandos*, 2 Ves. 417; 7 Bro. Parl. 505; *Parsons v. Freeman*, 3 Atk. 748; *Cave v. Hollford*, 3 Ves. 682; *Vawser v. Jeffery*, 16 Ves. 519; 7 Bro. Parl. 593.

(a) Mr. Cruise says, the conveyance did not pursue the articles, but went beyond them. 6 Cruise, 97, n.

(b) This last ground does not seem to be warranted by the statement of facts in the case.

(c) Where one has made a will and afterwards a codicil, and then executes a deed adopting the will and conveying the land accordingly; the deed is valid, and avoids the codicil. *Dawson v. Dawson*, Rice, 243.

(d) Where one having an equitable title makes a will, and afterwards acquires the legal estate; this passes to the devisee, the will and deed being regarded as only one instrument. *Smith v. Jones*, 4 Ohio, 115.

66. It is said,(1) the doctrine of presumptive revocations appears to have been carried much too far, and has been disapproved of by the ablest judges of modern times. Lord Mansfield remarked, that constructive revocations, contrary to the intention of the testator, were founded on artificial and absurd reasoning, and ought not to be indulged; and that some overstrained resolutions of that sort had brought a scandal on the law.(2) But Lord Kenyon said,(3) in reference to this point, "the best rule is, *stare decisis*. My opinion is formed, (in favor of revocation,) upon the authority of all the cases from the time of Lord Rolle. Such were the opinions of Lord Trevor, Lord Hardwicke, and Lord Mansfield: the latter of whom, though finding fault with former decisions, thought himself fettered by the authorities. I take it, therefore, that the law of the land is clearly and indisputably fixed, if at any time it can be fixed, that where the whole estate is conveyed away to uses, though the ultimate reversion comes back to the grantor by the same instrument, it operates as a revocation of the prior will."

67. A devise is revoked by a subsequent *exchange*, though after the testator's death the land is restored to his heir, by reason of a defect in the title to the land taken in exchange.(4)

68. Where lands devised are subsequently conveyed, parol evidence is inadmissible, both in law and equity, that no revocation was intended, though amounting to the clearest demonstration; as, for instance, evidence of the testator's conversations with respect to the motives of making the will, or of his referring to it as his will. Such evidence would go to prove a *republication*, if anything. Judge Buller observed upon the plain distinction between this case, depending on *the solemn acts of the party himself*, and the case, heretofore referred to, of a revocation by *marriage, &c.*, depending on *circumstances*, where parol evidence is always admitted.(5)

69. Where a deed is procured by fraud, and therefore directed in Chancery to be delivered up to be cancelled, it does not revoke a prior devise.(6)

70. An alteration merely in the *quality* of a testator's estate is no revocation of the devise. Thus, where a *cestui que use*, before the statute of uses, made a will, and afterwards received a feoffment from the trustee; this was held no revocation. The same principle is applied in any case, where one having an equitable interest devises it, and afterwards gains the legal estate. Lord Hardwicke says, wherever the estate is modified in a manner different from that in which it stood at the making of the will, there is a revocation; but none, where the testator remains with the same estate and interest exactly, and disposable by the same means, and without fresh modification.(7)

71. The above rule was distinctly applied, as the sole ground of de-

(1) 6 Cruise, 90.

(2) Swift v. Roberts, 3 Burr. 1491; Doe v. Patt, Doug. 722; Goodtitle v. Otway, 2 H. Bl. 523.

(3) 7 T. R. 418-19; 1 Bos. & P. 576; 3 Ves. 682.

(4) Atty. Gen. v. Vigor, 8 Ves. 256; Rawlins v. Burgess, 2 Ves. & B. 382.

(5) Goodtitle v. Otway, 2 H. Bl. 516; (Witter v. Mott, 2 Conn. 67.)

(6) Hawes v. Wyatt, 3 Bro. 156; (Harwood v. Oglander, 6 Ves. 215; Atty. &c. v. Vigor, 8, 283; Hawes v. Wyatt, 2 Cox, 263; Wright v. Littler, 3 Burr. 1244; Smithwick v. Jordan, 15 Mass. 113.)

(7) 1 Rolle's Abr. 616, pl. 3; Sparrow v. Hardcastle, 3 Atk. 798; Brydges v. Chandos, 2 Ves. 417. (See Roe v. Griffiths, 4 Burr. 1952;) Livingston v. Livingston, 3 John. Cha. 156.

cision, to the following case. A, in consideration of marriage, covenanted to convey to trustees, to the use of himself for life, remainder to secure an annuity to the wife, then to the sons and daughters in tail, successively, then to his own right heirs. Afterwards, A devised his lands, in case he should have no issue, to the wife for life, remainders over; and subsequently, in pursuance of the marriage articles, conveyed to B in fee, to the uses specified in the articles.^(a) Held, the will was not revoked; that A had only the reversion in fee, and his acquiring the legal interest made no difference; and that B was a trustee for the purposes of the will.⁽¹⁾

72. Where one owning the equitable fee devises it, and afterwards takes a conveyance of the legal fee, this is no revocation, because the conveyance was *incident* to the former estate. But, if he take a conveyance of the legal fee for the purpose of preventing dower, this is a revocation, being a change in the quality of the estate.⁽²⁾ (See sec. 82.)

73. A devise is not revoked by a subsequent conveyance, which merely changes the trustees.

74. Devise by A to trustees. He afterwards made a codicil, directing them to pay for certain lands which he had contracted for, and convey them to the uses stated in the will. A subsequently paid for the lands and had them conveyed to trustees in trust for himself in fee. Held, although at the making of the codicil *the vendor* was trustee for A, and the conveyance therefore changed the trustee; this was no revocation.⁽³⁾

75. So, where a mortgagor, having made his will, pays off the mortgage, and takes a conveyance to a trustee for himself, this is no revocation.⁽⁴⁾

76. Partition between tenants in common does not revoke a prior devise made by one of them. Otherwise, where the estate in the land is altered; as where, in England, by a fine subsequent to the partition, the whole land is allotted to the testator, to such uses as he shall appoint, and, in default of appointment, to him in fee.⁽⁵⁾

76 *a*. So a will is not revoked by proceedings for partition, which give the testator a several seizin of the whole land. But such will does not pass the after-acquired portion of the land.⁽⁶⁾

77. A *partial* disposition of the estate devised, or a disposition of only a part of the lands, is but a partial or *pro tanto* revocation.^(b) Thus, a lease for years, to commence from the testator's death, of lands devised in fee; unless made to the devisee himself, in which case it would revoke, as being incompatible with the devise. So a mortgage

(1) Williams v. Owens, 2 Ves. 595.

(2) Ward v. Moore, 4 Madd. 368. See Brain v. Brain, Mad. & Geld. 221.

(3) Watts v. Fullarton, Doug. 718. See Ellbeck v. Wood, 1 Russ. 564; Matthews v. Venables, 9 Moo. 236.)

(4) Doe v. Pott, Doug. 709. See Johnson v. Johnson, 1 C. & M. 140.

(5) Risley v. Baltinglass, T. Ray. 240; Webb v. Temple, 1 Freem. 542; Luther v. Kirby, 8 Vin. 148; Marwood v. Turner, 3 P. Wms. 169; Tickner v. Tickner, 3 Atk. 742; (Knollys v. Alcock, 7 Ves. 564; 8, 281; Maundrell v. Maundrell, 10, 249.)

(6) Duffel v. Burton, 4 Harring. 290.

(a) It is difficult to see how these facts could be construed to present "the simple question," (as Sir R. P. Arden expressed it,) whether the accession of the legal title to an interest before equitable revoked a devise of the latter.

(b) But a conveyance of the whole estate, though for a partial purpose, revokes. Vawser v. Jeffery, 2 Swanst. 268.

revokes only *pro tanto*. If made to the devisee, it was held, in one case,⁽¹⁾ that it would be a complete revocation; but this case seems to have been doubted and overruled.⁽²⁾ So a conveyance to trustees to pay debts, revokes only *pro tanto*. In the two last mentioned instances, although *at law* the testator parts with his whole estate, so that nothing descends to the heir; yet *in equity* he conveys only a chattel interest, and the case is therefore like that of a *lease* subsequent to the will. Upon this ground, equity departs in such case from its usual principle of *following the law*.⁽³⁾ But a conveyance to trustees, for payment of debts, then to such uses as the testator shall appoint, and, if no appointment, to him in fee, is a revocation.⁽⁴⁾

7. A testator conveyed his share of the real estate, under the will of his deceased father, and making part of the testator's real estate devised to his children, to trustees, to pay his father's debts, and then in trust for the devisees of his father and their representatives. Held, this was a revocation of the will only to the extent of paying the debts of the father; and that the residue should be held by the trustees in trust for the devisees, and not the heirs of the testator.⁽⁵⁾

79. A testator devised to his son his homestead, which was mortgaged, and directed that the son should pay one-half the mortgage, and the other half be paid from the testator's estate; and he further directed, that after payment of debts and certain legacies to his daughters, the overplus should be divided among all his children, after first taking therefrom enough to clear the homestead for his son, if not otherwise done. The homestead was sold, and bought in by the executor, and the sale affirmed by the heirs of the son, who had died insolvent. Held, the provision for applying the overplus to clear the homestead was defeated by the sale.⁽⁶⁾

80. Bankruptcy revokes a devise only *pro tanto*, for the payment of debts; because, after such payment, the assignees are trustees for, and may be required to convey to, the debtor.⁽⁷⁾

81. The surrender of a leasehold revokes a devise thereof, because the thing given no longer exists. A distinction is to be noted in this respect between *freehold* and *chattel* interests. The surrender of an old term, whether for life or for years, is often accompanied by the taking of a new one. In both cases alike, the devise of the old term is revoked. And if the term is *freehold*, although the words of the will are such as to embrace the new term, referring to all terms of which the testator *shall die* possessed, or, "all my leasehold estate," &c., yet it cannot pass, because acquired after the making of the will. But if the term is for years, words of this nature may pass the new term. It is a question of intention, however, and in one case the want of *prospective* words was held to exclude the renewed term. The words were, "my leasehold,

(1) *Harkness v. Bayley*, Prec. in Cha. 514.

(2) 5 Ves. 661; *Baxter v. Dyer*, Ib. 656; *Peach v. Philips*, Ib. 664.

(3) *Vernon v. Jones*, Prec. in Cha. 32; *Ogle v. Cooke*, 2 Bro. 592; 7 Bro. Parl. 517; *Sparrow v. Hardcastle*, 3 Atk 805.

(4) *Carter v. Thomas*, 4 Greenl. 341; *Hawes v. Humphrey*, 9 Pick. 350; *Hodgkinson v.*

Wood, Cro. Car. 23; *Perkins v. Walker*, 1 Vern. 97; *Coke v. Bullock*, Cro. Jac. 49; *Hughes v. Hughes*, 2 Mun. 209; *Parker v. Lamb*, 3 Bro. Parl. 12; 3 John. Cha. 155.

(5) *Livingston v. Livingston*, 3 John. Cha. 148.

(6) *Grout v. Hapgood*, 13 Pick. 159.

(7) *Charman v. Charman*, 14 Ves. 580.

garden," &c.(1) But where the old term is surrendered, and a new lease accepted, and the testator dies before the latter is sealed; this is no revocation.(2)

82. The devise of an estate *pour autre vie* is revoked by a subsequent purchase of the fee.(3) (See sec. 72.)

83. But a devise of a term, in trust for the devisee of a freehold, is not revoked by revocation of the latter.(4)

84. Where a will, duly attested, and disposing of both real and personal estate, is revoked as to the former by an alienation thereof; the will remains as a *testament* only, and is revocable accordingly.(5)

85. In Vermont it has been held, that there can be no revocation, in whole or in part, but in the way pointed out by the statute,(a) except *from necessity*; that is, when the testator has aliened the devised estate, and there is nothing for the will to operate upon, in so far as it is revoked. Also, that the purchase, after making the will, of land included in the general description of a devise, is no revocation, as it indicates an intention rather to perfect than revoke the will. So in Ohio, it is held, that in such case, to prevent circuity of action, the deed may be attached to the devise, and considered but one assurance.(6)

86. In New York, such purchase after making the will is a revocation at law, but not in equity. But, by the Revised Statutes of that State, and also those of Arkansas, no agreement by the testator to convey the land is a revocation of the will either in law or equity; but the property passes by the will, subject to a claim for specific performance against the devisee. So a charge or incumbrance is no revocation, but the devise takes effect, subject thereto. So, in New York, any transfer which merely *alters* the testator's estate is no revocation, unless expressly declared such. Where the conveyance is wholly inconsistent with the will, unless the former depends upon a contingency which has failed, it revokes the will.(7)(b)

(1) *Marwood v. Turner*, 3 P. Wms. 163; 2 Atk. 597; *Rudstone v. Anderson*, 2 Ves. 418; *Hone v. Medcraft*, 1 Bro. 261; *Carte v. Carte*, 3 Atk. 174; *Slatter v. Noton*, 16 Ves. 197; (*James v. Dean*, 11, 383;) *Stirling v. Lydiard*, 3 Atk. 199.

(2) *Abney v. Miller*, 2 Atk. 593.

(3) *Galton v. Hancock*, 2 Atk. 430.

(4) *Darley v. Langworthy*, 3 Bro. Parl. 359.

(5) *Brown v. Thorndike*, 15 Pick. 388.

(6) *Graves v. Sheldon*, 2 D. Chip. 71; *Blandin v. Blandin*, 9 Verm. 210; *Smith v. Jones*, 4 Ohio, 121.

(7) *Clapper v. House*, 6 Paige, 149; 2 N. Y. Rev. St. 64; Ark. Rev. St. 766.

(a) In many of the States, implied revocations are expressly recognized.

(b) These provisions are all adopted in Ohio. *Swan*, 997. In New Hampshire, disseizin or wrongful dispossession of the testator does not revoke a devise. Rev. St. 311.

CHAPTER XCIII.

REPUBLICATION OF DEVISES.

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| <ol style="list-style-type: none"> 1. General objects and effects of republication. 2. Must be in writing, but may be implied. 3. A <i>codicil</i> is <i>per se</i> a republication; his- | <ol style="list-style-type: none"> 7. Exception to the general rule, founded upon restrictive words of the <i>codicil</i>; case of <i>Strathmore v. Bowes, &c.</i> |
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1. IN immediate connection with the *revocation* of devises, which was the subject of the last chapter, may properly be considered that of *republication*, the effect of which is directly opposite to that of revocation. *Republication* either revives a will which has been wholly avoided, or else causes it to operate upon certain subject matters, upon which, if left in its original state, it would not have operated. The common, and perhaps the only application of the latter principle is, that where lands have been acquired by the testator after making the will, and, therefore, as has been seen, do not pass thereby, a republication of the will extends its operation to such lands, if its terms are broad enough to embrace them.(a)

2. The history of the doctrine of republication is briefly this. Before the statute of frauds, any *words*, importing an intention to republish, amounted to a republication.(b) After the statute of frauds, it was first held that there could not be an *implied* republication, but in order to republish a will it must be re-executed. The latter cases, however, seem to have settled the principle, subject to an exception, which will be presently noticed, that a *codicil*, attested as the law requires a devise of lands to be attested, whether actually attached to the will or not; or whether the will is present at the making of the *codicil* or not; is *per se* a republication and passes after-purchased lands.(1)(c)

(1) 6 Cruise, Tit. 38, ch. 7; Yarnold v. Cush. 118; Murray v. Oliver, 6 Ired. Equ. 55; Wallis, 4 Y. & Coll 160; Rob. on Wills, 345 Love v. Johnson, 12, 355; Harvey v. Chouteau, 14 Mis. 587; Wikoff, &c., 15 Penns. 281. 349; Van Cortlandt v. Kip, 1 Hill, 590; Wait v. Belding, 24 Pick. 129; Brimmer v. Sohler, 1

(a) There seems to be no little confusion, in the expressions used in various cases upon this subject. The prevailing language is, that a *republished* will of course passes after-purchased lands, if the terms of the will include them; or, in other words, that the question, whether a will is republished, and the question whether such lands pass, are, in fact, one and the same. But in some cases, it seems to be clearly implied, that a will may be held to be republished, and yet not to pass after-purchased lands. See Haven v. Foster, 14 Pick. 541. Some of the cases speak of a *qualified* republication.

(b) It has been held in North Carolina, that where republication of a will is sought to be proved by parol evidence, there must appear a clear determination on the part of the testator to r. publish; and even then it is to be doubted whether it could be done on mere parol evidence of the testator's declarations. Battle v. Speight, 10 Ired. 459.

And it has been since decided, that the republication of an attested will must be by a re-execution of the same instrument, or by the execution of a *codicil*, with the forms required by statutes. It cannot be done by oral declarations merely. Love v. Johnston, 12 Ired. 355.

In 1837, a testator made his will in his own handwriting, unattested, and it was placed among his valuable papers. In 1847, being about to leave the country, he deposited the will, for safe keeping, with a third person. Held, this did not amount to a republication, and after-purchased lands did not pass. Battle v. Speight, 9 Ired. 288.

(c) After a will was prepared for signature, but before signing, an addition which the testator called a *codicil* was made to it, providing for certain grandchildren. The will con-

3. The case by which the modern doctrine was first settled, and to which all the subsequent accordant cases refer (sometimes with disapprobation) as a decisive authority, is *Acherly v. Vernon*.⁽¹⁾ In the case of *Barnes v. Crowe*,⁽²⁾ Lord Commissioner Eyre says "the question, if it was not to be considered as determined, and so determined as that the court could hardly consider itself at liberty to revise it, would be a question of great difficulty:" "but that case (*Acherly v. Vernon*,) was so determined, and was of such authority, that everything must yield to it." The same authority is attributed to the case in question, but with much stronger expressions of dissent, by Sir Wm. Grant, in *Pigott v. Waller*.⁽³⁾ He says, "it appears to have been held in *Barnes v. Crowe*, that in *Acherly v. Vernon* it was established, that every codicil is a republication." "If he departed from *Barnes v. Crowe*, it would be to set everything loose again, and not to get back to what he thought better, the old rules, for then *Acherly v. Vernon* would then be in the way."^(a)

4. In *Acherly v. Vernon*, the testator, after making his will, purchased certain *fee farm rents*, and *assart rents*, and contracted for certain lands. By a codicil, he expressly devised his *after-purchased lands*, and desired "A and B to be two of my trustees," and devised "my said *real estate* to them accordingly." Held, the rents and lands contracted for passed by virtue of the codicil, republishing the will.⁽⁴⁾

5. In *Barnes v. Crowe*, the testator by his will devised all his estates in the county of Kent, *that he might die seized or possessed of*; afterwards purchased lands in that county; and then made a codicil, duly executed to pass lands, but expressly disposing only of personal estate. Held, the after-purchased lands passed to the devisee.⁽⁵⁾

6. In *Doe v. Davie*, a testator, after making his will, purchased *copyhold* lands, and surrendered them, before making a codicil, "to such uses as the testator shall by his last will appoint." He afterwards made a codicil, ratifying and confirming the will, except wherein it was thereby altered, and desiring the codicil to be annexed to and taken as part of the will, to all intents and purposes. Held, a republication of the will, and that the after-purchased lands passed.⁽⁶⁾

7. But where the effect of a codicil is expressly, or by the fair and necessary construction of language, confined to the lands devised by the will, it does not operate as a republication of such will so as to make it pass after-purchased lands. In other words, the effect of a codicil upon the will, of making it speak as to the existing property of the testator, may be restrained by the manner in which the codicil is expressed.⁽⁷⁾

(1) Com. R. 381; 3 Bro. Parls 85; See *Howland v. Union*, &c., 3 Sandf. 83.

(2) 1 Ves. jun. 486.

(3) Ib. 98.

(4) Com. R. 381.

(5) 1 Ves. jun. 486.

(6) 1 Cowp. 158. (See *Potter v. Potter*, 1 Ves. 437; *Rowley v. Eytou*, 2 Mer. 128; |

Goodtitle v. Meredith, 2 M. & S. 5; *Mooers v. White*, 6 John. Ch. 375; *Brownell v. De Wolf*, 3 Mas. 486; *Miles v. Boyden*, 3 Pick. 216.)

(7) 6 Cruise, 108; 1 Rob. 353. See *Howland v. Union*, &c., 3 Sandf. 83; *Stilwell v. Mellersh*, 5 Eng. L. & Equ. 185.

tained the attesting clause, "signed, sealed and published, &c., as his last will, &c., in our presence;" and the addition contained the clause, "at same time and place the testator signed and acknowledged this annexed codicil." Held, the two writings were to be treated as parts of one instrument, and as if there had been but one signing, viz., that at the end of the codicil. *Regley v. Gard*, 20 Ohio, 310.

(a) See 1 Rob. 352.

8. The following remarks of Sir Wm. Grant point out the distinction between *express* republication, and that which is *implied* from the mere act of making a codicil. "A direct republication or re-execution is an unequivocal act, making the will operate precisely as if it were executed on the day of publication. But a reference to the will proves only that the testator *recognizes its existence*, which the act of making a codicil necessarily implies; not that he means to give it *any new operation*, or to do more by speaking of it, than he had already done by executing it. Why his speaking of it should *make the will speak*, as it is said, is not very easily discernible as a question of intention. If he speak of it at all, he must speak of it as existing upon the last day as well as the first; but can that show that he means it to exist in any other form, or with any other effect, than he originally gave it?"(1)

9. The leading case illustrative of the doctrine stated in sec. 7, is that of *Strathmore v. Bowes*,(2) which must be regarded as of high authority, having been decided the same way, and on the same grounds, successively, in the King's Bench, in Chancery, and by the House of Lords.

10. A testator devised all his freehold and copyhold, &c., in trust, for certain purposes, afterwards purchased new lands, and then made a codicil, whereby, after reciting that he had devised all his freehold, &c., to the trustees named, he revoked the same, so far as related to two of the trustees, and devised *his said lands*, &c., to the other trustees upon the same trusts, and in conclusion declared the codicil to be part of his will. Held, the after-purchased lands did not pass. The decision was chiefly founded upon the consideration, that by speaking of *the said lands*, previously referred to as having been devised by the will, the testator manifested as clear an intent to limit the operation of the codicil to the lands which he owned at the date of the will, as if he had enumerated them, or described them by metes and bounds.

11. In *Parker v. Bisroe*,(3) the same general principle was recognized. There, the testator devised lands, levied a fine, taking back an interest to himself, and then made a codicil, containing certain revocations, and directed to be made part of the will. Held, the lands subject to the fine did not pass; upon the ground, it seems, that the revocation could extend only to the lands which might pass by the will, thereby confining the operation of the codicil to those lands, and negating it as to the lands in question; and that the codicil, merely revoking the will as to part of the lands thereby devised, could not operate to devise lands.

12. In *Smith v. Dearmer*,(4) a testator devised an estate to his wife, and after certain bequests he gave and devised to her all other his freehold, copyhold and leasehold estates, not therein before otherwise disposed of. He afterwards purchased lands; and, by a codicil, after reciting the devises to his wife, he, in case his wife should die before him, devised all his *said estates* to trustees upon certain trusts. Held, the after-purchased lands did not pass.

13. The general doctrine relating to republication, with the qualifications already referred to, was stated in a late case by the Court in Massachusetts, substantially as follows: To give a republication the effect of passing after-purchased lands, the words of the will must be

(1) *Pigott v. Waller*, 7 Ves 98.
(2) 7 T. R. 482; 2 Bos. & P. 500.

(3) 8 Taun. 699.
(4) 3 Young & Jer. 278.

such as, if used at the date of republication, would include such lands. To constitute a good devise, the intent to devise and the power of devising must concur. In general, the reason why a devise does not pass after-purchased lands is, not the want of intent to pass all the estate, but the want of legal power to devise. The true question is, do the intent and power both concur; if they do, the devise is effectual, if not, it is inoperative. *Prima facie*, the execution of a codicil, duly attested, &c., is a republication of the will; more especially where the codicil contains words, declaring and confirming the will to be in force, either in whole, or so far as it is not altered or revoked by the codicil itself.(1)

14. In 1820, A made his will, duly attested to pass lands. He afterwards purchased other lands, and in 1831 made a codicil, on the same paper, duly attested, and reciting the execution of the will, declaring the instrument to be a codicil, directing it to be annexed to and made part of the will, and confirming the will in everything, except where it was thereby revoked and altered. The will gave to B, brother of A, one-half of "all my estate," for life; "the other half, in equal shares, and in fee simple, to all the children of my brother C, and my sister D, respectively." The will then gave to the same children the remainder in the other half, expectant upon B's life estate; "and also all other estate which I have, and all right, &c., not above devised," &c. The codicil, in addition to the clauses above mentioned, proceeded to "revoke and annul each and every bequest and devise made, given and bequeathed in and by said will to the children of my sister; and, secondly, I give, &c., all and every part of my estate, of whatever description, which is in said will in any way given to said children of D, to the children of my brother C," &c. Held, the will was republished by the codicil; that the words, "all my estate," at the date of the codicil, included the after-purchased lands; that the will showed an intent to dispose of all A's property, but the technical rule of law prevented its operating upon future property; that at the date of the codicil he had power to devise, and the continuing intent to do so was declared by the republication and confirmation of the will; and that, the intent and power thus concurring, the after-purchased lands passed. It was further held, that by the enlarged operation of the will, arising from republication, without words of restraint, the children of both C and D would have taken their respective shares in the estate thus enlarged; but that by the same codicil which effected the republication, the whole power of the will, which devised anything to C's children, was annulled and taken away, and the portion of estate which, but for these words of revocation, would have gone to one family, was given to the other; that the will and codicil must be construed together as one instrument, and in such way as to give effect to every part, and to the general intent, if practicable; that the will being only confirmed, except so far as it was revoked, &c., and being revoked to the extent of annulling every bequest and devise to C's children, and, therefore, coming within the exception, the devise to these children could derive no force from the words of confirmation.(2)

14 *a*. A testator, possessed only of personalty, by the residuary clause of his will, bequeathed it to his wife for life, and after her death to his

(1) *Haven v. Foster*, 14 Pick. 541. 543. | (2) *Haven v. Foster*, 14 Pick. 534.
And see *Hughes v. Turner*, 3 My. & K. 688. |

children in certain proportions. Having subsequently acquired real estate, he made a codicil, by which he left certain shares to his wife "on the same terms as I have everything else, (everything I possess I leave her.)" Held, the words showed a present intention, and passed the real estate.(1)

15. The principle settled in *Strathmore v. Bowes*, (sec. 10,) has been recognized in a late English case. A, by a codicil to her will, duly attested, &c., revoked an annuity given by the will, and, after reciting the death of B, one of the trustees named in the will, revoked the estates and powers thereby given to him, and devised them to C, thereby placing C in the place and stead of B, as trustee, &c. A further gave a legacy to C, in consideration of his assuming the trust, and revoked one given by the will to B. Between the making the will and that of the codicil, A purchased lands. Held, (a) the will was not republished, and these lands did not pass.(2)

16. In another late case in England, the will, after certain specific devises, gave "the rest, residue and remainder of the real estate whatsoever, in possession, reversion, remainder, and expectancy," &c. The codicil recited a desire to dispose of *the whole* of the testator's lands, tenements, &c., but proceeded to revoke certain devises made by the will, and to devise the property *thereby disposed of* to other persons. One clause was as follows: "and whereas by my will I have given, &c., all and every my real, &c., in or near, &c., now I do hereby revoke the same devise and bequest, and give, &c., all and every my estate, so given, &c., as herein before lastly recited," &c. Between the making of the will and that of the codicil, the testator purchased lands. Held, under the circumstances of the case, it was as if the testator had said, "I am now dealing with the property I have given, and with no other;" that the operative words of the will, being unambiguous, were not to be explained or controlled by the preamble; and that the after-purchased lands did not pass.(3)

17. But where by his will the testator devised lands to his wife for life, and after other devises gave her the residue in fee; and, having purchased other lands, by a codicil, recited that he had made a will disposing of *all he was then possessed of*, ratified and confirmed the will, and then gave the wife a life estate in a part of the after-purchased lands, and made an ineffectual devise of the rest; held, the residuary clause in the will in favor of the wife embraced these lands.(4)

18. Republication will be effected by a will executed conformably to the law *at the time*, though not to the law existing when the will was made. As where a statute has required a smaller number of witnesses than were before necessary.(5)(b)

(1) Warner v. Warner, 2 Eng. L. & Eq. 68.

(2) Hughes v. Turner, 3 My. & K. 666.

(See also Dunlap v. Dunlap, 4 Desaus. 321; Kendall v. Kendall, 3 Munf. 272.)

(3) Monypenny v. Bristow, 2 Russ. & My.

117.

(4) Williams v. Goodtitle, 10 B. & C. 895.

(5) Andrews v. Turner, 3 Ad. & El. N. S.

177.

(a) By Sir C. Pepys, M. R., after a contrary decision by his predecessor.

(b) Devise to a residuary devisee of all the testator's other freehold estate. Having afterwards acquired lands in fee, he took the will in his hands, and said before the attesting witnesses, "I have called you to witness that this is my last will." A certificate of re-acknowledgment was written upon the will, acknowledged by him, and signed by the witnesses. Held, a good republication. Reynolds v. Shirley, 7 Ohio, (part 2.) 39.

The following case is founded upon a late English statute in relation to wills. A testator,

CHAPTER XCIV.

VOID AND VOIDABLE DEVICES.

2. Devise to the *heir-at-law*.
12. Incapacity of testator.
13. *Lapsed* devises.

20. Non-performance of condition.
22. Alteration.
23. Uncertainty.

1. THE subject of this chapter has been incidentally noticed, in several points of view, in previous chapters. A few additional particulars remain to be mentioned.

2. A devise has been held to be void, if made to the heir-at-law, and if it gives him the same estate which he would have inherited. (a) In such case, the heir takes by descent, which is a better title than that of a devisee, because an adverse claimant may enter upon the latter, but not upon an heir. Another reason, in favor not of the heir, but of creditors, is, that if he claimed by devise, he might plead to an action *riens per descent*.

3. The rule applies to a devise in remainder. Thus, where one devises to his wife for life, remainder to his heir-at-law; the latter devise is void.

4. Also, to a devise charged with, and to be forfeited upon the non-payment of, debts or portions; as, for instance, portions to younger children. (1)

5. Devise to the testator's wife for life, then to his next heir-at-law, and his or her heirs, provided he pay £1,000 according to the wife's appointment. The heir takes by descent. (2)

(1) *Paramour v. Yardley*, Plow. 545; Co. Lit. 12 b: 2 Saun. 7, n; *Clarke v. Smith*, Com. R. 72; *Bashpool's case*, 2 Leon. 101; *Hust v. Winchelsea*, 1 Bl. R. 187; *Smith v. Triggs*, 1 Str. 487; *Allen v. Heber*, 1 Bl. R. 22; *Fearne's Op.* 229; *Haynworth v. Pret-*

ty, Cro. Eliz. 833, 919; *Parsons v. Winslow*, 6 Mass. 169; 14, 88; *Emerson v. Inchbird*, Ld. Ray. 728; *Buckley v. Buckley*, 11 Barb. 43.

(2) *Clarke v. Smith*, Com. R. 72.

by will made in 1815, devised, "all the rest, residue and remainder of his personal estate, goods and chattels whatsoever and wheresoever," subject to the payment of debts and legacies, to his brother, and appointed him executor. He further devised "all and singular his manors, &c., lands, tenements, &c., at or near, &c., in the county D, &c., and all other his real estates in said counties and elsewhere," &c., to one Shaftor. In 1841, after the death of his brother, the testator made a codicil, appointing another executor, and ratifying and confirming his will, and died in 1841. At the making of the will and at his death, the testator owned freehold and leasehold estates in the county D. Held, under St 1 Vict., c. 26, s. 24, the will must be considered as made in 1844, and as a general devise of the testator's lands within sec. 26 of that statute, that the leaseholds passed to Shaftor, and the prior devise of the personal estate did not show a contrary intention, so as to prevent the operation of the enacting part of the 26th sec. *Wilson v. Eden*, 2 Eng. L. & Eq. 345.

(a) Otherwise, by St. 3 & 4 Wm. IV, ch. 106. If heirs take under that description *by purchase*, they take *per capita*. *Campbell v. Wiggins*, Rice, 10. They may take by devise under that description. *Davis v. Saul*, 6 Dana, 52. A devise to children of the testator's brothers and sisters, by name, is construed *per capita*. *Malone v. Majors*, 9 Humph. 577. Where a devise is made to the heir, the debts shall be charged *pari passu* upon his land and that devised to others. *Biedermar v. Seymour*, 3 Beav. 368. A testator devised and bequeathed all his real and personal estate to trustees, upon trust (after certain life estates) for the heir-at-law of his family then living, whosoever the same might be. Held, the next of kin of the testator had no interest under this devise. *Teltam v. Ashton*, 1 Eng. L. & Eq. 165. And if either pay more than his share, there shall be a contribution. *Ib.*

6. Where the devisee would be heir of only part of the estate, as, for instance, where he is the son of one of two daughters deceased, he takes the whole by devise. He cannot take even his own share by descent, for there can be no descent of a moiety to one co-parcener as heir; nor can one plead a descent *uni filix et coheredi*; but it is a descent to all.(1)

7. Where the estate devised to an heir differs in *quantity* from that which he would have inherited, he takes as devisee. Thus, where the devise is in tail; or in fee-simple, but with a devise over, upon his dying a minor, and without issue.(2)

8. Difference in the *quality* of the estate has the same effect. Thus a devise to daughters, who would have inherited as parceners, makes them joint tenants by purchase. So a devise to gavelkind heirs in England, "equally to be divided," makes them tenants in common by purchase.(3)

9. Mr. Fearn was of opinion, that where a devise is made to the heir and a stranger, the former takes by descent; because, if one moiety only were devised, leaving the others to descend, the heir and devisee would hold in common. So, if one moiety were devised to the heir, and the other to a stranger, they would hold in the same way.(4)

10. Where, in a petition for partition, the party claimed as devisee, being also an heir at law, and no objection was made by the defendant on this ground; it was held that the exception should be considered as waived, and the petitioner not turned round to another action.(5)

11. Where one makes an appointment by will, to his heir at law, the latter takes as heir.(6)

12. A will, like other instruments, is rendered void by incapacity of the testator, or by fraud and imposition practised upon him. But equity will not itself set aside a will upon these grounds, but will send the case to a trial at law of the issue *devisavit vel non*.(7)

13. In England, a devise becomes void, or *lapses*, by the devisee's dying before the testator. It is said, this rule was established early in the reign of Elizabeth, and probably derived from the civil law maxim, "*pro non scriptis sunt iis relicta, qui vivo testatore decedunt*." (a) If the devise is in fee or in tail, the word *heirs* or *issue* is used as a term of *limitation*, (b) denoting the quantity of estate given; not to describe the heirs or give them anything. And the construction is the same, where the land is first devised for life, then to trustees to preserve, &c., during the life of the devisee, then to his issue; because in such case the devisee, if he had survived the testator, would have taken an estate tail. Nor is a contrary inference to be drawn from the facts, that the devisee had children at the making of the will, known to the testator, and who

(1) Reading v. Royston, 1 Salk. 242; 2 Ld. Ray. 829; Com. R. 123.

(2) Plow. 545; Scott v. Scott, Amb. 383.

(3) Cro. Eliz. 431; Bear's case, 1 Leon. 112.

(4) Fearn's Opin. 128.

(5) Newkirk v. Newkirk, 2 Caines, 351-6.

(6) Hurst v. Winchelsea, 2 Keny. 444.

(7) Kerrick v. Brausby, 7 Bro. Parl. 437; Webb v. Claverden, 2 Atk. 424.

(a) By the same law, where a slave was bequeathed, and her offspring, and the former died before the testator, the offspring still went to the legatee. Otherwise, where a slave and his *peculium* were devised; or a farm, with its instruments. Dom. lib. 2, 97.

(b) That *issue* is a word of *purchase*, see Cursham v. Newland, 4 Mees. & W. 101.

are also in part heirs at law; or that a remainder over is given only on *failure of issue*.(1)

14. It has been said, in argument, that the rule in question was never judicially contradicted or impeached, though there is a dictum of Chief Justice Popham to the contrary, in regard to a devise in tail. In one case also, the Court of King's Bench in Ireland held a contrary doctrine; but its judgment was reversed by the King's Bench in England, and the House of Lords.(2)

15. Where a devise is made to two persons, one of whom dies before the testator, the question whether the devise lapses will of course depend upon the consideration, whether they would have been joint tenants, or tenants in common.

16. One devised to A, his son, B, his daughter, and C and D, grandsons, surviving children of a deceased daughter, to be divided between them into three parts, C and D taking together a third. He devised other portions to other children, in full of their share, and charged A, B, C and D with his debts, in equal thirds. C died, living the testator, unmarried. Held, the devise to him did not lapse, but survived to D.(3)

17. Republication of the will after the devisee's death does not prevent the lapsing of the devise; although his death, and the birth of a child after the making of the will, were known to the testator.(4)

18. A trust, as has been seen, (Vol. I, *Trust*), *fuses itself on the land*. Hence a devise in trust does not lapse by the devisee's death.(5)(a)

19. Land, which is the subject of a lapsed devise, passes, not to a general residuary devisee, but to the heirs, because the testator's intention, as to the property to be included in the residuary devise, is to be judged of *at the making of the will*, when the specific devise was considered valid, and not to be collected from subsequent, unforeseen accidents.(6)(b)

(1) 6 Cruise, 115; Weishaupt v. Brehman, 5 Bin. 118; Brett v. Rigden, Plow. 341; Fuller v. Fuller, Cro. Eliz. 422; Hutton v. Simpson, 2 Vern. 722; Wynn v. Wynn, 3 Bro. Parl. 95; Goodright v. Wright, 1 P. Wms. 397; 1 Stra. 25; Woodright v. Wright, 10 Mod. 370; Hodgson v. Ambrose, Doug. 337; Gore v. Stevens, 1 Dana, 203; Warner v. White, 3 Bro. Parl. 435; 2 Ves. 77; Fisher v. Hill, 7 Mass. 86; 4 Nev. & M. 308; Moffat v. Carow, 7 Paige, 328.

(2) Warner v. White, 3 Bro. Parl. 435.

(3) Anderson v. Parsons, 4 Greenl. 486. See 1 Root, 78; Allison v. Kurtz, 2 Watts 185; Humphreys v. Howes, 1 Russ. & My. 639.

(4) Doe v. Kett, 4 T. R. 601.

(5) Att. Gen. v. Downing, Amb. 571.

(6) Wright v. Hall, Fortes. 182; Roe v. Fludd, Ib. 184; Gore v. Stevens, 1 Dana, 206; Doe v. Underdown, Willes, 293; Hayden v. Stoughton, 5 Pick. 528; Brewster v. McAll, 15 Conn. 274. See Spooner's, &c., 9 Eng. L. & Equ. 101.

(a) Where land is devised upon a trust which is void, as tending to create a perpetuity, the heir is entitled to recover. Hillyard v. Miller, 10 Barr, 326.

(b) It is the prevailing statutory law of the United States, that a devise *to issue* does not lapse, if they leave issue. In Maine, Rhode Island, Ohio and Michigan, the rule applies to *any relation*. In Arkansas, to any child or descendant, leaving a child or descendant. In New Hampshire, to *heirs in the descending line*. N. H. Rev. St. 312. In Vermont, to *any relation*, unless there is an intention to the contrary. Verm. Rev. St. 257-8. In Maryland, it seems, no devise lapses by the devisee's death. Md. L. 598. In Kentucky, a devise passes to the *descendants* of the devisee; if none, to the surviving devisee. Sts. 1852. In Virginia, *to issue*. Code, 516. In North and South Carolina, *to a child*. In Connecticut, a child or grandchild. In Massachusetts, a devise to a grandchild lapses, if the devisee die, living the testator, not leaving lineal descendants. Ballard v. Ballard, 18 Pick. 41. See Bishop v. Bishop, 4 Hill, 138; Swan, 999. In Pennsylvania, in case of devise to a

20. A devise becomes void, by non-performance of a condition subsequent, annexed to it. Thus, where land was devised to a town, for the purpose of building a school-house upon it, provided it should be built within a certain distance of the meeting-house; held, the devise was upon condition subsequent, a neglect to perform which for twenty years forfeited the estate.⁽¹⁾

21. In such case, the remaining interest, contingent upon such forfeiture, is itself a proper subject of devise; and, unlike a lapsed devise, passes to the residuary devisee, not to the heir at law.^{(2)(a)}

22. Alteration of a will, whether material or immaterial, by one claiming under it, avoids the will. Whether even a material alteration by a stranger has this effect, *qu.* ²(3)

23. A devise may be void for *uncertainty*, either of the devisee or the thing devised. But a mistake of the name or description of the devisee does not avoid the devise, if the person intended can be clearly ascertained.⁽⁴⁾ (See ch. 98.)

(1) *Hayden v. Stoughton*, 5 Pick. 528. See *Chambers v. Wilson*, 2 Watts, 495; 10 B. & C. 433; 4 Gill & J. 323; *Clapp v. Stoughton*, 10 Pick. 463.

(2) *Ib.* See 3 Whart. 477; 3 M. & S. 300; *Phillips v. Phillips*, 1 My. & K. 649.

(3) *Jackson v. Malin*, 15 John. 293.

(4) *Cheyney's case*, 5 Rep. 68 b; *Doe Joinville*, 3 E. 172; *Inbts. &c. v. Cole*, 3 Pick. 232; *Blundell v. Gladstone*, 1 Phil. 279. See

8 Conn. 47; 6 Watts, 192; 3 Halst. 90; *Doe v. Fleming*, 2 C. M. & R. 638; *Jones v. Hancock*, 4 Dow. 145; *Waite v. Templer*, 2 Sim. 524; *Richardson v. Watson*, 4 Barn. & Ad. 787; *Doe v. Perratt*, 10 Bing. 198; *Pugh v. Goodtitle*, 3 Bro. Parl. 454; *Thomas v. Thomas*, 3 Barn. & Cr. 823; *Bayeaux v. Bayeaux*, 8 Paige, 333; *Liley v. Hey, Hare*, 580; *Bradshaw v. Bradshaw*, 2 Y. & Coll. 72; *Lucas v. Duffield*, 6 Gratt. 456; *M'Culloch v. Gil-*

brother or sister, or the children of a deceased brother, &c., the testator leaving no lineal descendants, the devise shall not lapse, unless the will expressly so direct. Penn. St. 1844, 565. A statute of this nature has been held not to substitute the surviving issue for the deceased devisee, absolutely; but to leave such an interest in the latter, as he can himself dispose of by will. *Johnson v. Johnson*, 3 Hare, 157.

Devise to two persons, one of whom died before the testator. Held, (in Tennessee,) by the act abolishing joint tenancies, his share lapsed, and descended to the heirs of the testator. *Strong v. Ready*, 9 Humph. 168.

Devise to a daughter, and if she should die without children surviving her, "then I give said land to my own heirs at law." The daughter died, living the testator, as also another daughter. Held, the children of the latter took the share which their mother would have taken. *Simmons v. Gooding*, 5 Ired. Equ. 382.

Devise to a daughter,—"on the marriage of my said daughter, said property to be held by my said daughter and her husband during their joint lives and the life of the survivor, and, at the decease of, &c., and her said husband, to be equally divided between the children of my said daughter, who may survive their said parents, and be living at their death," &c. The daughter married and died, having no children, in her father's lifetime; and her husband survived the testator. Held, the husband took nothing, the devise having lapsed. *Simmons v. Gooding*, 5 Ired. Equ. 382.

Devise as follows: "I give to A two tracts of land, &c. I enjoin it on him to pay to each of B's four children, £50 to each child, as they arrive at the age of 16; then the said lands will be his right and property, to him and his heirs forever." C, one of the four children, died before the age of 16, and D, another of them, died in the lifetime of the testator. Held, the amounts charged on the land in favor of C and D were sunk, and the land was to be held free of that charge. *Smith v. Wiseman*, 6 Ired. Eq. 540.

A testator devised the proceeds of sale of certain real estate, which he directed to be sold, and all other moneys, arising from any other part of his estate; certain pecuniary legacies to his nieces, a nephew, and a brother; and all the remainder of his estate to two of his brothers, to be equally divided between them. The will was made before the Pennsylvania act of May 6th, 1844, but the testator died after its passage. The residuary legatees died before the testator, each leaving children. Held, that the devises in favor of the residuary legatees lapsed, and that their residuary interest did not vest in their children by virtue of said act. *Martindale v. Warner*, 3 Harris, 471.

(a) In North Carolina, where a devise fails to take effect, the property passes under the residuary clause. St. 1844-5, 125-6. So, in Virginia. Code, 516.

24. "My land and slaves to be equally divided among my children; to each of my daughters a small tract of land." Held, the latter clause was void for uncertainty.(1)

25. A testatrix devised as follows: "I desire that, at my decease, after my just debts are paid, my property may be divided in the following manner:—To the Bible Society, Education, Colonization and Home Missionary Societies, each five hundred dollars." These societies were not described by their proper corporate names, though they were well known and usually called by those names. Held, the legacies were void for uncertainty.(2)

26. Devise—"let my debts be paid. Let all my goods and chattels be sold, and the fund accumulated, except so far as is needed for the comfortable settlement of the family, except £200 a year to be laid by as a marriage portion for my daughter," (naming her,) "my son," (naming him,) "is heir to the whole real estate." Held, void for uncertainty.(3)

CHAPTER XCV.

CONSTRUCTION OF DEVISES.

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| 1. Devises construed <i>liberally</i> , by the intention. | 9. Uncertain devise void. |
| 3. 10. <i>General intent</i> . | 13. <i>Or</i> and <i>and</i> . |
| 4. Rules of law must govern—technical words and decided cases. | 17. <i>Her</i> and <i>their</i> . |
| 8. Introductory words. | 18. Transposition of estates. |
| | 21. Inconsistent clauses. |

1. UPON the ground, that wills are often made in haste, when a party is *inops consilii*, and by inexperienced persons; a devise is not construed strictly and technically, like a deed, but liberally, and according to the intent. And such intent may be gathered, in case of doubt, not from detached clauses, but from the whole will, "*ex visceribus testamenti*," so that every word may have its effect if possible. So a will and codicil may be considered together, and construed as different parts of the same instrument.(4)(a)

more, 11 Penn. 370; Maeck v. Nason, 21 Verm. 115; Atty. &c. v. Jolly, 2 Strobb. Equ. 379; Timberlake v. Harris, 7 Ired. Equ. 188; Adams v. Jones, 9 Eng. L. & Equ. 269.

(1) Weatherhead v. Sewell, 9 Humph. 272.
(2) Taylor v. The American, &c., 7 Ired. Equ. 201.

(3) Jackson v. Craig, 3 Eng. L. & Equ. 173.

(4) Strong v. Cummin, 2 Burr. 770; Barker v. Giles, 2 P. Wms. 282; Findlay v. Riddle, 3 Binn. 148; Richardson v. Noyes, 2 Mass. 58; Mann v. Mann, 14 John. 1-9; Berry v.

Berry, 1 Har. & J. 421; Reno v. Davies, 4 Hen. & M. 291; 2 Marsh. 50; 3 Des. 83-4; 2 Day, 350; 1 Yeates, 518; 3 Yeates, 187; Dawes v. Swan, 4 Mass. 208; Hoxie v. Hoxie, 7 Paige, 187; Hallett, Ib. 375; Mofat v. Carow, Ib. 328; Jarnigan v. Conway, 2 Humph. 50; Morton v. Barrett, 9 Shepl. 257; Hone v. Van Schaick, 3 Barb. Ch. 488; Hall v. Chaffee, 14 N. H. 215; Brimmer v. Sohler, 1 Cush. 118; Button v. American, &c., 23 Verm. 336; Reid v. Hancock, 10 Humph. 368.

(a) It has been held, that, in order to fix the person intended as a devisee, parol evidence is admissible of the testator's declarations and instructions in the drawing of the will. *Hiscocks v. Hiscocks*, 5 Mees. & W. 363. See ch. 96, sec. 19. But see *Watkins v. Flora*, 8 Ired. 374; *Barnes v. Simms*, 5 Ired. Equ. 392.

Wills are to be construed from the written language of an instrument itself, nor will evidence *aliunde*, as a general rule, be admitted. *Collins v. Hope*, 20 Ohio, 492. Unless there be some latent ambiguity. *Hearn v. Ross*, 4 Harring. 46.

Parol evidence may be received for the purpose of counteracting fraud in the devisee; and,

2. General words may be restrained by subsequent particular ones, and shall not be so construed as to defeat the intent.

3. A manifest *general intent* shall be carried into effect, though some particular intent is thereby defeated, and though the clause by which the former is expressed stands first in order in the will. The two intentions are balanced against each other, and that which is weightiest and most comprehensive effectuated. Courts substitute themselves in the place of a testator, and suppose the question to have been asked him—you have willed two things, which cannot both be obeyed exactly, and therefore one must yield to the other. What must be the answer? I wish to be obliged in the principal, capital and most material destination I have made, and to reject the secondary and subordinate one.(1)

3 a. A testator, after directing that "all his worldly substance be disposed of," proceeded to say, that he willed and devised that a certain farm fall into the possession of A, laying this injunction and prohibition, "not to leave the same to any but the legitimate heirs of A's father's family, at his, A's decease." Held, there was a general intent to give the fee to A, with a particular intent respecting the power of alienation, which was void, because inconsistent with a reasonable enjoyment of the fee, and also, for uncertainty.

4. A will should be construed in consistency with the rules of law.(a) Two questions are to be made; 1. What was the intent; 2. Was it agreeable to the rules of law. Judge Yates remarked, that if the intent

(1) Per Wilmut, Ch. J., *Roe v. Crew*, Wilmut, 272; 2 Wils. 322; *Robinson v. Robinson*, 1 Burr. 38; *Doe v. Applin*, 4 T. R. 82; *Chase v. Lockerman*, 11 Gill & J. 685; *McGram v. Davenport*, 6 Por. 319. But see *Pickering v.*

Langdon, 9 Shepl. 413; *McCullough v. Gilmore*, 11 Penn. 370; *Kelly v. Stinson*, 8 Blackf. 387; *Cornish v. Wilson*, 6 Gill, 299; *Pue v. Pue*, 1 Md. Ch. 382; *Lewis v. Daniel*, 10 Humph. 305.

in some cases, to attach a trust to an estate devised. But, in such cases, the court will act with extreme caution, in receiving such evidence. *Collins v. Hope*, 20 Ohio, 492.

Bequest to the "Franklin Seminary of Literature and Science, Newmarket, N. H." There was no institution of that name, but there was an institution, incorporated by the name of the "Trustees of the South Newmarket Methodist Seminary." Held, a latent ambiguity, which might be explained by parol evidence. *Trustees v. Peaslee*, 15 N. H. 317.

Parol evidence that the word "children" was inserted in a will by mistake, instead of "sons," is inadmissible. *Weatherhead v. Baskerville*, 11 How. U. S. 329.

A will contained the following clause: "my land and slaves to be equally divided among my children; to each of my daughters a small tract of land." Held, parol proof was not admissible, that the testator intended to use the word "sons" instead of "children." *Weatherhead v. Sewell*, 9 Humph. 272.

A *holograph* will appeared to have been altered, by turning a devise in fee into a limitation for life, with a remainder in fee, to one who was not elsewhere named in the will. Held, it was competent to prove declarations of the testator, prior to the execution of the will, that he meant to provide for the latter, but not specifying what property he intended to leave to her, for the purpose of showing that the alteration was prior to the execution of the will. But, it seems, such declarations, made after execution of the will, would not be competent to prove that the alteration was prior to the execution. *Shallcross v. Palmer*, 6 Eng. L. & Equ. 155. See *Maec v. Mason*, 21 Verm. 115.

It is said, circumstances indicative of the state of the testator's affections towards the object of his bounty, or the relative circumstances of his connections, or his acts and declarations in respect of the thing given, the relative amount of advancements, and the difference in value of the portions of the land, are constantly admitted, as proper evidence to remove a latent ambiguity in a will. *Brownfield v. Brownfield*, 12 Penn. 136.

(a) A will must be construed according to the law in force when the testator died. *Kelly v. Stinson*, 8 Blackf. 387. A will cannot be corrected by a court of equity, because the testator misapprehended its legal effect. *Arthur v. Arthur*, 10 Barb. 9.

was not thus legal, "we had better adhere to the law, and let a thousand testators' wills be overthrown." (1)

5. Technical words are presumed to be used in their legal sense, and language receives its grammatical construction, or primary and ordinary meaning; unless there is a plain intention to the contrary. But where technical terms are employed in such a manner, that to give them their strict meaning would defeat the intention apparent from the will, a liberal or popular interpretation will be given them. Thus, the term "inherit" will be held applicable to lands, devised or conveyed by a parent or ancestor, to a child or descendant. (2)

6. Where decided cases have established the meaning of certain words and phrases, as expressing intention, they are to be considered as of binding authority. (3)

7. Mr. Hargrave strongly urges the impolicy of being guided by mere *conjecture* in the interpretation of wills, instead of attending to their legal or grammatical construction, as leading to endless litigation. "For how can a client or a purchaser be assured that the conjecture of the most able counsel, or the most experienced conveyancer, will be in all points the same as the conjectures of the judges or the Chancellor?" So Lord Kenyon remarked, upon the far greater number of controversies arising from wills than from deeds; and that perhaps it would have been better, originally, to apply to the former as well as the latter strict rules of interpretation; but, at the same time, the current of authorities in favor of a liberal construction must prevail. (4)

8. Introductory words are regarded in determining the intent, where this is doubtfully expressed. So also the situation of the testator, the number of his children, and the nature of his property. And the same words may have different constructions, as applied to different kinds of property. But where real property and personal are given in the same clause by an illiterate testator, it seems the words shall have the same construction for both. (5)

9. The title of an heir, being certain, shall not be defeated by an uncertain devise, but only by express words or necessary implication, and an effectual disposition to another person. It is not sufficient that the testator has signified his intention, that the heir shall not inherit any part of his estate. This rule has been held to be even more appropriate in this country than in England; because here the equitable rule prevails, by which all the children inherit equally. (6)

9 a. Where the words of a will left it doubtful whether, in devising a *balance*, the testator meant to dispose of the residue of a certain fund or of his whole estate; held, equity would give the construction most favorable to the heir. (7)

(1) Doe v. Laming, 2 Burr. 1108; Hodgson v. Ambrose, Doug. 341; Perrin v. Blake, 1 Col. Jurid. 283; Kingsland v. Rapelye, 3 Edw. 1; Martindale v. Warner, 15 Penn. 471; Butler v. Butler, 3 Barb. Ch. 304.

(2) Hone v. Van Schaik, 3 Comst. 538; Cowper v. Earl, &c., 2 P. Wms. 741; Doug. 341; Jones v. Posten, 1 Ired. 166; De Kay v. Irving, 5 Denio, 646.

(3) Goodtitle v. Whitby, 1 Burr. 233.

(4) Harg. Tracts, 295; Fearn, 266; Denn v. Mellor, 5 T. R. 561, Howland v. Union,

&c., 3 Sandf. 83; Malcolm v. Malcolm, 3 Cush. 472.

(5) Hogan v. Jackson, Cowp. 306; 1 P. Wms. 286; 4 Bro. 441; 2 Ves. 616; Doe v. Fyldes, Cowp. 833; Wyatt v. Sadler, 1 Munf. 537; Watkins v. Flora, 8 Ired. 374.

(6) Prec. in Cha. 473; St. John v. Bishop, &c., Cowp. 99; 2 Bñ. 19-20; Berry v. Berry, 1 Har. & J. 421; Baxter v. Bradbury, 2 Appl. 260; Haxton v. Corse, 2 Barb. Ch. 506. See Finley v. Hunter, 2 Strobb. Equ. 208.

(7) Bane v. Wick, 19 Ohio, 328.

10. In illustration of the principle, that *the general intent* of the testator shall prevail, and, to effectuate it, repugnant words be rejected, or omitted words supplied, Mr. Cruise states the following case.

11. A devised all his lands, *for the continuing them in his name and blood*, to trustees in fee, till his son B, who was then nearly 21, should reach the age of 27; then to the use of *B and his assigns, for and during the term of 99 years*, without impeachment, &c., *and from and after the determination of that estate*, to the said trustees *during the life of B*, to preserve, &c., permitting B to take the profits; after B's death, to the use of his issue, &c., (by successive limitations,) with powers to the trustees, and to B, of leasing and jointuring. B, dying during the term, devised it; and the question arose, whether B's estate ended with his life. Held, by Lord Hardwicke, it was thus determinable: Some of the grounds were, that the term might be made determinable with B's life by other parts of the will, though expressed as absolute. This construction was favored by the want of any limitation to B's executors, &c. The estate of the trustees would preserve B's estate during his life, but not the term from forfeiture by the executors. The trustees' estate was the same as in a determinable term; so also, the successive limitations to issue. If the term was absolute, the issue had a dry reversion, and the term might outlast sons and grandsons. It was not to be supposed, that A intended to have alienated his estate from his family for 105 years, which might be the effect of making the term absolute. If absolute, the powers of leasing, &c., were unnecessary. It was absurd to suppose that the son, whom A would not trust with the estate under 27, should have power to alienate it for 99 years. There is no rule that an estate cannot be abridged by implication. If the will had been a marriage article, equity would not have decreed the settlement of an absolute term; and it would even have rectified an executed conveyance.(1)

12. A testator devised to his only son A; and, in case his wife should be *enceinte* at his death, and A should die a minor, without issue, to such after-born child, with a devise over to his nephews. After the making of the will, the testator had two more sons, B and C, born during his life. A being dead, without issue, and the wife not having been *enceinte* at the testator's death, held, B and C, though not expressly provided for, were intended to be embraced in the provision for after-born children; that it was never meant to prefer a posthumous child, or a nephew, to another child; and that B and C took precisely as a posthumous child would have taken.(2)

13. The word "or" is sometimes construed to mean "and," where the intent so requires. As in case of a devise in fee, with a limitation over if the devisee die a minor *or* without issue. And the same construction has been given, where a codicil, making a further devise over, after reciting the clause in the will, repeated the same expressions, with the addition of the words "as aforesaid." In such case, there is considered to be but one contingency, consisting of two branches.(3)

14. It has been said, that there is perhaps no word in the language of more equivocal effect than *or*. By a slight variation in the phrase, it

(1) *Coryton v. Helliar*, 6 Cruise, 124.

(2) *White v. Barber*, 5 Burr, 2703.

(3) *Soulle v. Gerrard*, Cro. Eliz. 525; *Price*

v. Hunt, Pollexf. 645; *Walsh v. Peterson*, 3 Atk. 193; *Janney v. Sprigg*, 7 Gill, 197.

may be made to have either a conjunctive or disjunctive operation. Hence courts have always paid little attention to a word, the effect of which depends on distinctions so small and subtle. The same is true even of acts of parliament.(1)

15. Devise to A, his heirs and *assigns*; but if he dies before he attains the age of 21 years, *or* marriage, *and* without issue, devise over. A lived to be of age, and died unmarried. Held, to effect the intent, the word *or* was to be rejected, as if the clause were, "and if he dies before 21, unmarried, and without issue;" and that a concurrence of all these circumstances was necessary to defeat the devise to A, more especially as the condition was subsequent, not precedent.(2)

16. It has been said in argument, that the above construction has been given for one plain reason, expressed or implied in all the cases, namely, that the will discovers a plain general intent to prefer the first devisee *and his issue* before the devisee over; and, if the word *or* were construed literally, in case of the first devisee's dying a minor, but *leaving issue*, the latter would be disinherited. This reason, of course, does not directly apply, where the case is inverted; that is, where the devisee dies after coming of age, but not leaving issue. But the word *or*, having received its construction upon the ground mentioned, must, of course, be held to mean *and*, alike in either alternative.(3)

17. To effect the intent, the word *her* has been construed to mean *their*.(4)

18. Estates created by a will may be transposed in order of time, if the intent so require.

19. Devise to A for life, remainders to his first and other sons in tail, remainder to trustees for their lives, to support such remainders. Held, in Chancery, the last remainder should precede the first.(5)

20. But, where a will is formally written, and the meaning plain, the court will not transpose expressions in other clauses, and upon other subjects, in order to enlarge the estates of devisees, or create limitations in their favor.(6)

21. Where the same thing is devised twice, whether both devisees shall be void for repugnancy, or the last shall prevail, or the two devisees hold in common, seems to be an unsettled question.(7)

22. It is said, if two parts of a will are totally inconsistent and irreconcilable, the latter shall prevail; even though a codicil affirms the prior one. But great effort will be made to reconcile them, before either will be rejected.(8) Also, that the court must look to the previous part of the will, to ascertain what interest the testator intended to give,

(1) *Fairfield v. Morgan*, Dom. Proc. 1805; 1 Call, 212; 6 John. 54; 2 Bin. 532; 5, 253; 1 Yeates, 411; *Ray v. Enslin*, 2 Mass. 554.

(2) *Barker v. Suretees*, 2 Str. 1175; *Framlingham, v. Brand*, 3 Atk. 390; *Fairfield v. Morgan*, Dom. Proc. 1805; *Doe v. Halley*, 8 T. R. 6; *Denn v. Kemeys*, 9 E. 366; *Doe v. Jessep*, 12, 288; *Right v. Day*, 16 E. 67.

(3) *Fairfield v. Morgan*, Dom. Proc. 1805; 6 Cruise, 131.

(4) *Keith v. Perry*, 1 Des. 353.

(5) *Green v. Hayman*, 2 Cha. Ca. 10; *Fearne*,

495; *Hunt v. Johnson*, 10 B. Mon. 342. See *Walker v. Tipping*, 10 Eng. L. & Equ. 294.

(6) *Mooberry v. Morse*, 2 Munf. 453.

(7) Co. Lit. 112 b, n. 1; *Owen*, 884. That they take in common, see *McGuire v. Evans*, 5 Ired. Equ. 279.

(8) 6 Cruise, 133; *Sims v. Doughty*, 5 Ves. 243; 6, 102. (See 11 Gill & J. 185; *Baird v. Baird*, 7 Ired. Equ. 265; *Shipperdson v. Tower*, 1 Y. & Coll. Cha. 441; *Pickering v. Langdon*, 9 Shepl. 413; *Pue v. Pue*, 1 Md. Ch. 382.

and to the ulterior part, to see in what events that interest is given over.(1)

22 *a.* A will contained the following clauses: "My estate to be equally divided amongst my children; to each of my daughters a small tract of land; my lands and slaves to be equally divided among my children." Held, that the second clause was void and inoperative, and could not be used to render the other clauses ambiguous.(2)

CHAPTER XCVI.

CONSTRUCTION OF DEVISES.

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| 1. What words make a devise. | } | 43. Description of property devised, <i>lands,</i> |
| 17. Devise by <i>implication</i> . | | <i>tenements, &c.; messuage, &c.; residue,</i> |
| 19. Description of devisee— <i>children, heirs,</i> | | <i>&c.; freehold and leasehold property;</i> |
| <i>issue, relations, &c.</i> | | <i>reversions, mortgages, trusts, &c.</i> |

1. WITH regard to the words necessary to make a devise, the general rule is, that words of mere *recital* are insufficient for that purpose. Thus, where a testator, being tenant for life, remainder to his wife for life, remainder to his own heirs, made his will as follows: "My lands by W, my wife is to enjoy for her life; after her death, of right it goeth to my daughter E, forever, provided she hath heirs." Held, no devise.(3)

2. Words of advice, recommendation or desire, do not create a devise at law. Where the persons and property are distinctly marked out, such words may raise a trust in equity, unless this would be clearly inconsistent with the interest previously given to the supposed trustee. In order to raise a trust, the party must *declare his will*, and not leave it purely at the option of the devisee, whether he will or will not give the estate. In many cases in Chancery, clauses directory have been taken for a disposition.(4)(*a*)

3. A testator devised all his estate to his wife, adding, "I desire and request my said wife to give all her estate, which she shall leave at the time of her death, to her and my nearest relations." Held, as both the

(1) *Rochford v. Hackman*, 10 Eng. Law & Equ. 64.

(2) *Weatherhead v. Baskerville*, 11 How. 329.

(3) *Wright v. Wyvell*, 2 Vent. 56; *Right v. Hammond*, 1 Com. R. 232.

(4) *Bland v. Bland*, 6 Cruise, 142. See *Lawless v. Shaw*, Lloyd & Goold, 154 n.; *Payne*, 2 Y. & Coll. 636; *Briggs v. Penny*, 8 Eng. L. & Equ. 231.

(*a*) A testator, after bequeathing to his wife part of his property, proceeded to request that one A, who was not a legatee, might provide for her a chaise or other conveyance, and attend her whenever and wherever she might wish to go, for a suitable compensation, if she should desire it. Held, this was too vague and indefinite for a legacy to the wife. *Whipple v. Adams*, 1 Met. 444.

A testator made his will in these terms: "I give and bequeath all my property, of whatsoever description, to my wife, for the maintenance of herself and our children," naming them, and naming her sole executrix. Held, a trust for the benefit of the children. *Harris in re*, 8 Eng. Law & Equ. 537.

property and the parties to take were described only generally, this was no devise.(1)

4. The technical words to make a devise are "give and devise." But any others of equivalent meaning will be sufficient.(2)(a)

5. A testator having, before the Statute of Uses, conveyed lands to his own use, after the statute made a will, by which he willed that the feoffees should make an estate to A and the heirs of his body. Held, a devise in tail to A.(3)

6. A devised lands to his son B, and directed that B should renounce to C, his other son, all his right in a certain estate. Held, a devise of the estate to C in fee.(4)

7. A testator, having lands and personal property, bequeathed an annuity to his wife, and legacies to his children, *his debts being first paid*, and appointed three persons "as trustees of inheritance for the execution hereof." Held, the real estate passed to the trustees, and was chargeable with the annuity, &c.(5)

8. A devised a particular estate, subject to her debts and charges, to B her son in fee; and earnestly requested B, that upon failure of his issue, he would either by will or otherwise so convey and settle the estate, or so much thereof as he should hold at the time of his death, that upon failure of issue it might come to be enjoyed by her daughter in tail, with remainders over. B devised the estate. Held, that even in equity B had the absolute control of the estate; that he took, not a bare power, but the fee itself; and his power of disposing was not collateral, but flowed from the nature of his estate; that this construction arose necessarily from the clause, "so much thereof as he shall hold at his death," implying his right to part with the estate in any way he might think fit; and that this clause could not be satisfied by a reference to the *debts and charges*, which had no particular relation to the time of his death.(6)

9. Devise to A of certain estates; but, if A should die without a son, the testator *recommended* that he should devise them to B. Held, this raised no trust in favor of B.(7)

10. Devise of the testatrix's fortune to A; *recommending* to him, if he should die without issue, to do justice to B and her children, if he should think them worthy of it. But if any unforeseen accidents should make the whole or any part acceptable or serviceable to him, he might dispose of it. Held this was no trust.(8)

11. Devise of an estate in A, to B, eldest son of the testator, for life, remainder to his other sons in tail. B entered upon the estate; and, being possessed of leasehold estates in A, for lives and for years, devised

(1) *Palmer v. Schribb*, 8 Vin. 289; 2 Des. 83.

(2) *Eacles v. England*, 2 Vern. 467.

(3) *Bro. Abr. Devise*, pl. 48.

(4) *Hodgkinson v. Star*, 1 Ld. Ray. 187.

(5) *Trent v. Trent*, 1 Dow, 102.

(6) *Bland v. Bland*, 6 Cruise, 142; (Fitzger. 314.)

(7) *Cunliffe v. Cunliffe*, *Prec. in Cha.* 201, n.

(8) *Le Maître v. Bannister*, *Prec. in Cha.* 201, n.

(a) A paper, in the handwriting of the deceased, and signed by him, but not witnessed, commencing thus, "directions how I want my will wrote," is not a will or codicil. *Hocker v. Hocker*, 4 Gratt. 277.

Precatory words create a trust, where the subject and the object are certain. *Harrisons v. Harrison*, 2 Gratt. 1.

An uncertain charge upon an estate does not render the subject so uncertain, as to prevent the raising of a trust by precatory words. *Ib.*

the latter to the trustees of his father's will, to the uses of that will, so far as he had power to do it. "All my other leasehold estates in A, I give to my brother C forever, hoping he will continue them in the family." Held, the will did not import a devise, as the words did not clearly demonstrate an object.(1)

12. Devise to A, not doubting but that she will dispose of what shall be left at her death to our two grandchildren. Held, no devise.(2)

13. There are other cases, scarcely distinguishable in their facts from the foregoing, which hold a contrary doctrine.

14. Devise to a wife, "not doubting but that she will dispose of the same to and amongst my children, as she shall please." Held, a trust for the children, as she should appoint.(3).

15. Devise of a leasehold in a house to a wife. "But I desire her, at or before her death, to give, &c., unto and amongst such of *my relations* as she shall think most deserving and approve of." Held, the word *relations* was a legal description, and vested a trust interest in the parties to whom it applied, to take effect through an appointment of the wife; and, she having died without exercising it, the devise was not void, but the power vested in the Court of Chancery. The property, being personal, was divided according to the statute of distributions.(4)

16. Devise to trustees in fee, in trust to convey, &c., as A, the daughter of the testator, whether sole or covert, should direct or appoint, &c. A subsequent clause declared, that although the testator meant to give to A the absolute disposal of the property, in order to avoid the expense and trouble of Chancery proceedings, he requested her to direct the money arising therefrom, to be applied as he had ordered, in default of her direction and appointment. Held, the will did not authorize A to direct the trustees to dispose of the lands for her absolute benefit or without consideration; but only empowered her to have them sold, and disposed of the proceeds in the purchase of lands, in the same manner as the clear profits of the premises in default of an appointment.(5)(a)

(1) Harland v. Trigg, 1 Bro. 442.

(2) Wynne v. Hawkins, 1 Bro. 179. But the words "in the fullest confidence" are imperative; and raise a trust. Wright v. Atkins, 1 Turn. & R. 143.

(3) Richardson v. Chapman, 7 Bro. Parl. 318; Massey v. Sherman, Amb. 520.

(4) Harding v. Glyn, 1 Atk. 469; Nowlan v. Nelligan, 1 Bro. 489.

(5) Bute v. Stuart, 1 Bro. Parl. 476; (Pierston v. Garnet, 2 Bro. 38, 226; 17 Ves. 255; 9 Ves. 323.)

(a) Devise to A, with a recommendation or request to provide in his discretion for B. Held, insufficient to create a trust. Heneage v. Andover, 10 Price, 230.

Devise of all the testator's estate to his wife, having *confidence* that she would dispose of it after her decease, according to his views, communicated to her. Upon proof that at the time of making his will he desired her to give his whole property to B, and that she promised to do so; held, a trust was created in favor of B. Podmore v. Gunning, 7 Sim. 644.

Devise—"I will, firstly, that, loth to offend by the word *pay*, the generous feelings of my friends, whose kindnesses, &c., to H and his wife, I wish their acceptance of twenty-five acres of land," &c. The testatrix lived in the family of H, who sued her executor for her board, but failed to maintain the action. Held, a conditional devise, which, by bringing the action, H elected to relinquish. Hapgood v. Houghton, 22 Pick. 480. See Todd, 2 Watts & S. 145.

"I give, &c., all my estate, real and personal, to my wife, to her and to her heirs forever; recommending to her to give the same to my children, at such time and in such manner, as she shall think best." The testator left children. Held, the widow took an absolute estate in fee, not a mere trust for the children. Gilbert v. Chapin, 19 Conn. 342.

17. In some cases, an estate may be devised *by implication*. (a) But the implication must be a *necessary* one. That is, it must be so strong, that an intention to the contrary cannot be supposed. Thus, in a very ancient case, where land was devised to the heir *after the death of the wife*; it was held that the latter took a life estate; for, if she did not, the heir must take immediately, which would directly contradict the will. The same doctrine has been sometimes held, even where the devise, *after the wife's death*, is to a stranger; but it is now overruled, because in such case there is an equal implication in favor of the heir. (1)

18. A testator, having a son and two daughters, devised as follows—“if my son and daughters die without issue, all my lands shall be and remain to A and his heirs.” Held, that there was no express devise to the children; and that they could not take by implication; because, if they were to have successive estates tail, the order of succession was uncertain; and they could not take jointly for life, with several inheritances, for this would disinherit the heir, without a plain implication requiring it; and that the clause was a mere designation of the time when the land should come to A, and in the meantime the son inherited. (2)

19. With regard to the *description* of a devisee, it is sufficient that the words are such as, with the aid of other circumstances, to distinguish him from all other persons. “*Nihil facit error nominis cum de corpore constat.*” (See *ante*, ch. 95, s. 1, n.)

20. Devise to *Margaret, daughter of A.* A had a daughter named *Margery*. Held, a good devise to her. (3)

21. Devise to *William P., eldest son of Charles P., of T.* Charles P. had a son named Andrew. Held, he should take. (4)

22. Devise to *one of A's daughters*, that should marry with a Norton within fifteen years. Held, the word *first* should be supplied before the word *marry*, and that one of three daughters of A who married an N., within the time, took the land. (4)

23. So it has been held, that an illegitimate child may take under

(1) *Moone v. Heaseman*, Willes, 141; 1 Ves. & B. 466; Bro. Abr. Devise, pl. 52; Cro. Jac. 75; *Higham v. Baker*, Cro. Eliz. 15; *Smartle v. Scolar*, 2 Lev. 207; T. Jones, 98; *Fawkner v. Fawkner*, 1 Vern. 21; *Walker v. Whiting*, 23 Pick. 313; *Allum v. Fryer*, 3

Ad. & El. (N.S.) 442; *Davenport v. Coltman*, 9 Mees. & W. 481.

(2) *Gardner v. Sheldon*, Vaugh. 259.

(3) *Gynes v. Kemsley*, Freem. 293. See *Adams v. Jones*, 9 Eng. L. & Equ. 269.

(4) *Pitcairne v. Brase*, Finch, 403.

(5) *Bate v. Amherst*, T. Ray. 82.

(a) Devise in trust for children, subject to dower. The profits, &c., after such deduction, to be applied in support of children. Held, there was no devise by implication to the wife. *Adams v. Adams*, 1 Hare, 537.

Devise, that the property left should remain on the plantation under care of the testator's wife till the son should come of age, then the plantation to go to the son and others. Held, a devise by implication of the plantation to the wife till the period mentioned. *Bradshaw v. Ellis*, 2 Dev. & B. 20.

Devise for life to A and B, with certain interests to their issue male, upon conditions; and to the heir of the testator, on failure of male issue of A and B. Held, A and B took an estate tail by implication. *Franks v. Price*, 3 Beav. 182.

A fee cannot be taken by implication, where a different estate is particularly described. *Tator v. Tator*, 4 Barb. 431.

The following clause in a will, “I will next that all my estate, after my children are of age, and the decease of my wife, shall be equally divided among my children;” if unaffected by any other part of the instrument, gives to the wife a life estate by implication; but no such implication arises where the property was disposed of by other parts of the instrument. *Kelly v. Stinson*, 8 Blackf. 387.

a devise to him by name, as the testator's *son*; having acquired such name by reputation.(1)

24. Devise by a married man, having no legitimate children, to "the children which I may have by A, and living at my decease." Held, his natural children, who before the date of the will had acquired the reputation of being such, should take under the will.(2)

25. But illegitimate children cannot take, unless an intention to that effect appear from the will itself. No extrinsic evidence is admissible, except to show who had gained the reputation of children.(3)(a)

26. According to the maxim, "*nemo est hæres viventis*," a devise to the *heirs* of A, who is living, is void. But such devise, where the word *heirs* is qualified by other special words, may be good. In its strictest sense, the word *heir* signifies one who succeeds to a dead ancestor. But it is also frequently used in statutes, law books and records, to signify an heir apparent, and may therefore have this meaning in wills, to effect the intent.(4)

27. Devise in trust, for A to receive the rents for life, then to the heirs male of his body *then living*. A had a single son, B. Held, B took a vested remainder, as he would have done upon a devise to A's *heir apparent*.(5)

28. Devise of the remainder of all the testator's estate, to the heirs male of the body of A lawfully begotten. There was also a legacy to A. A having survived the testator, held in the House of Lords, affirming the judgment of the Court of Exchequer, which had been reversed in the Exchequer chamber, that the eldest son of A took under the devise.(6)

29. Devise to the testator's son, A, his heirs male, and to the heirs of his daughter B, jointly and equally, to hold to the lawful heirs male of A, and to the heirs of B jointly and equally, and their heirs and assigns forever. B survived the testator, having a son C. Held, C took by the devise.(7)

30. Devise in trust, for the support of A, and the issue of her body, during her life; then for the use of the heirs of her body, their heirs and assigns forever, *without respect to seniority of age, &c.* Held, upon the strength of the last clause, A's children, being a son and two daughters, took as purchasers.(8)

30 *a.* A testator, in the residuary clause of his will, devised and be-

(1) River's case, 1 Atk. 410.

(2) Wilkinson v. Adam, 1 Ves. & B. 422.

(3) Swaine v. Kennerley, 1 Ves. & B. 469.

(4) 3 Bro. Parl. 60. See Timberlake v. Harris, 7 Ired. Equ. 188.

(5) Burchett v. Durdant, 2 Vent. 311.

(6) Darbison v. Beaumont, 1 P. Wms. 229; 3 Bro. Parl. 60.

(7) Goodright v. White, 2 Bl. R. 1010.

(8) Doe v. Ironmonger, 3 E. 533.

(a) Devise to A, a widow, for life, and her three daughters, B, C and D, in fee. A legitimate daughter, named B, had been dead six years, and an illegitimate daughter of the same name claimed under the devise. Held, parol evidence was admissible, that the former was intended, and that the testator was ignorant of her death. Doe v. Baynon, 4 Per. & Dav. 193.

A devised to his son B a tract of land and a negro man, and directed that, at the death of the son, the said property "should be divided equally amongst his children." Held, the word children was a word of purchase, not of limitation, unless connected with other words, so as to show an intention to control its meaning, and limit the estate. Stubbs v. Stubbs, 11 Humph. 43.

queathed as follows: "My other two tracts of land, &c., and all my negroes, not mentioned, &c., to be equally divided between my two sons A and B, and my daughter C, and the heirs of my son D, deceased." Held, the words "heirs of D," meant the children of D, and the division must be *per capita*, each of the children taking one full share.(1).

31. Under a devise to *heirs male*, only heirs of the body can take—not collateral heirs; as, for instance, a nephew, the son of a brother.(2)

32. Devise to *the first heir male* of A. The first son of A takes.(3)

33. A devise to the right heirs of husband and wife, is a devise to such person as is heir to both of them—that is, to a child of both. And he shall take by purchase, no estate being given to the parents.(4)

34. A devise to *the right heirs* of the testator, *his son excepted*, is void, though the intention to disinherit such a son is expressly declared.(5)

35. The word *issue* embraces both children and grandchildren,(a) whether born before or after the making of the will. So a devise to the issue male of A, and his heirs forever, passes an estate by purchase.(6)

36. *Son* is a good word of description. Devise to the first son of A, who was not heir-at-law to his father. This goes to the second son of A.(7)

37. Devise to the testator's son A for life, then to the first, second, third, &c., sons of his body. The first son having died before the testator; held, the second should take *as first*.(8)

38. *Begotten* applies to future children, and *to be begotten* to those already born, as in case of deeds.(9)

39. The words *nearest relation* in a will do not refer to some single person, but are to be taken *collectively*, like *kindred* or *heir*.(b) More

(1) Harris v. Philpot, 5 Ired. Eq. 324.

(2) Ford v. Ossulston, 11 Mod. 189; Dawes v. Ferrers, 2 P. Wms. 1; 8 Vin. 317.

(3) Ashton v. Ashton, 1 Dall. 4.

(4) Roe v. Quartley, 1 T. R. 630; Co. Lit. 187 a.

(5) Pugh v. Goodtitle, 3 Bro. Parl. 454.

(6) Cook v. Cook, 2 Vern. 545; Luddington

v. Kime, 1 Ld. Ray. 205. See Pope v. Pope, 9 Eng. L. & Eq. 193.

(7) Denn v. Bagshaw, 6 T. R. 512; Marwood v. Darrel, Cas. Temp. Hard. 84; (5 Munf. 440.)

(8) Lomax v. Holmden, 1 Ves. 290.

(9) Doe v. Hallet, 1 M. & S. 124; 2 Vern. 545; 1 Ves. 290.

(a) Where gifts in a will are to "children," the general rule is, that when there are children, grandchildren cannot take. Ward v. Sutton, 5 Ired. Eq. 421.

A testator directed the sale of his property, and the proceeds to be divided equally amongst his children and grandchildren, "each grandchild drawing their equal proportion of what their ancestors would have drawn had they lived." Held, that the grandchildren took *per stirpes*. Hamilton v. Lewis, 13 Mis. 134.

The word "children," in a residuary clause, as it was used synonymously with the word "heirs," was held to include grandchildren. Hughes v. Hughes, 12 B. Mon. 115.

If, in a devise, a granddaughter of the testator is spoken of as his daughter, and her children as his grandchildren, and a subsequent clause or codicil gives a legacy to each of his grandchildren, it seems, the latter provision will include the children of the granddaughter. Hone v. Van Schaick, 3 Comst. 538. In Kentucky, a devise to children, if there are none, goes to grandchildren. Sts. 1852, 46.

Under a devise "to my grandchildren of, &c., to them, and their heirs forever, to be equally divided among them;" grandchildren born after the death of the testator do not take anything. Lookerman v. McBlair, 6 Gill, 177.

But the devise comprehends all persons answering the description at the testator's death. Ib.

(b) Lord Hardwicke remarked, as one ground of this rule, that it is common to say such a one has a *numerous relation*. This can hardly be considered a common idiom in this country.

especially is this construction to be given, where one clause disposes of both real and personal estate. And where the restriction is added, of a certain designated *name*, the word *name* is construed to mean *stock* or *blood*. Thus there was a contingent devise to the testator's *nearest relation* of the name of the P's. At the making of the will there were three persons in equal degree of this name, and a fourth who had been so, but was married. Two of the three married before the specified contingency happened, and thus changed their names. Held, the description in the will did not refer to the mere name of P, but was rather a description of *the stock or blood*; otherwise, some person, not within the view of the testator, might after his death either by act of Parliament or by marriage take the name of P, and thereby become entitled as devisee. The case is similar to that of a devise, upon condition of marrying one of the devisor's *name*. In this case, marrying a person who assumes the name in question is no fulfilment of condition.(1)

40. But, under a devise to "the first and nearest of the testator's kindred, *of his name and blood*, that should be living at the termination" of prior estates; it was held that no one should take, who was not at the time specified both of the name and blood of the testator; and that taking such name by the king's license prior to that time was not sufficient.(2)

41. Devise to the wife of the testator for life; then to be equally divided among the relations on his side. Held, the estate should pass to such relatives as would take under the statute of distributions; and the devise had reference to the state of things, not at the time of making it, but at the testator's death, so that the son of one who was of the next in kin at the making of the will, but since deceased, took nothing.(3)

42. *Descendants* is a good term of description, and includes all those who proceed from the body of the person named, as, for instance, grandchildren. So it may be restricted to persons of this description, who reside at a certain place; as, for instance, "the descendants of A, then living in and about Seven Oaks in Kent." But, under this clause, no one born after the making of the will can take.(4)

43. With regard to the words necessary to describe *property which is devised*, the same principle of *effecting the intention* applies, which governs devises in other respects. Any words are sufficient, by which the estate is reasonably identified, even though somewhat misdescribed, and the language used will embrace such property as would usually be covered by it, although a contrary intent may be indicated in regard to the particular subject in question.(5)

44. *Lands, tenements and hereditaments*, passes every species of real property. So also money agreed to be laid out in land.(6)

45. *All my lands*, will pass a house. But not if a contrary intention appear from other clauses. Thus, if the testator own a house in A, and a house and lands in B, and devise his house in A and *all his lands* in B; the house in B will not pass.(7)

46. Devise of all the testator's lands in A, called B lands, to his

(1) *Pyot v. Pyot*, 1 Ves. 355. But see *Bon v. Smith*, Cro. Eliz. 532.

(2) *Leigh v. Leigh*, 15 Ves. 92.

(3) *Doe v. Over*, 1 Taun. 263.

(4) *Crossly v. Clare*, Amb. 397.

(5) *Woods v. Moore*, 4 Sandf. 579.

(6) 6 Cruise, 154; *Doe v. Thomas*, 1 Mann. & G. 335; *Hall v. Fisher*, 1 Coll. 47.

(7) *Rashleigh v. Master*, 3 Bro. 99; *Ewer v. Hayden*, Cro. Eliz. 476-7.

youngest son in fee; and (in another clause) that if this son die without issue, the testator's wife should have *B lands*. The testator in fact owned *B lands* both in *A* and in *C*. Held, the wife took only those in *A*, these alone being given to the son. It might have been otherwise, if the first devise had been to the eldest son, who would have taken the lands in *C* by descent; and the wife would take all that he had.(1)

47. In general, *messuage* passes the *curtilage* and garden annexed. Whether the word *house* has the same operation, seems somewhat doubtful. But where one occupied, as tenant for years, a house, garden, stables, and a coal-pen, though using the two latter for the purpose of trade, as well as domestic convenience, and devised "the house I live in and garden;" held, the stables, &c., passed, not being otherwise disposed of.(2)(a)

48. It has been held, that where an intent appears to use the word *appurtenances* in a strictly technical sense, the devise of a *messuage with the appurtenances*, will not pass lands usually occupied with the house.(3)

49. The word *estate* includes every kind of property, unless specially restrained. Thus *fee-farm* rents pass under the words all my *real and personal estate*.(4).

50. Even the words *personal estates* will pass freehold lands, if such appears to be the intent. So leaseholds will pass under the general description of *goods*, &c., even though forfeiture of them is the consequence. But not by a devise of freehold lands, &c.(5)

51. A devise of "all the rest of my estate and effects, of what nature soever, to *A* and his executors, in trust, to add the interest to the principal," &c., does not pass a *freehold house*; the words evidently contemplating a *principal* of the same nature with the interest which was to be added thereto.(6)

52. *Rents* may pass the reversion to which they are incident. Thus, where the preamble is, "as to the disposition of all my lands and tenements," and the testator proceeds to devise *the rents* of a certain estate for years to one for life, remainder in tail; the reversion passes, as there is an evident intent to continue the estate of the devisee beyond the leases, and to dispose of the testator's whole property.(7)(b)

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| <p>(1) <i>Woodden v. Osbourn</i>, Cro. Eliz. 674.
 (2) <i>Carden v. Tuck</i>, Cro. Eliz. 89; 2 Cha. Ca. 27; <i>Doe v. Collins</i>, 2 T. R. 498.
 (3) <i>Buck v. Nurton</i>, 1 B. & P. 53.
 (4) <i>Barnes v. Patch</i>, 8 Ves. 604; 3 Yeates, 187; 6 Binn. 97; 6 John. 185. See <i>Quennell v. Turner</i>, 4 Eng. L. & Equ. 84.
 (5) <i>Doe v. Tofield</i>, 11 E. 246; <i>Doe v. Evans</i>,</p> | <p>9 Ad. & Ell. 719; <i>Parker v. Marchant</i>, 5 Mann. & G. 499. See <i>Barclay v. Collett</i>, 4 Bing. N. 658; <i>Doe v. Cranstoun</i>, 7 Mees. & W. 1; <i>Parker v. Marchant</i>, 1 Y. & Coll. Cha. 290; 2, 279; <i>Shipperdson v. Tomer</i>, Ib. 441; <i>Midland, &c. v. Oswin</i>, 1 Coll. 74.
 (6) <i>Doe v. Buckner</i>, 6 T. R. 610.
 (7) <i>Kerry v. Derrick</i>, Cro. Jac. 104.</p> |
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(a) *A*, owning a house in *S*, with a yard and garden, and also several adjacent lots, with buildings on them held by tenants, devised "unto *M* my house in *S*, now occupied by me." Held, this devise passed none of the property occupied by tenants. *Saltonstall v. Brown*, 3 Met 423. The devise of a *plantation* passes two tracts situated half a mile apart, but cultivated as one farm. *Bradshaw v. Ellis*, 2 Dev. & B. 20.

A devised to the heirs of his son "the plantation whereon I now live." *A* few years before his death he bought a lot contiguous to his homestead, though separated by a fence, which he cultivated with his home estate. His old homestead was called "the home lot," and the lot last purchased, "the Brown lot." Held, the word *plantation* included both lots. *Stowe v. Davis*, 10 Ired. 431. In Virginia, (Code 516,) a general devise of land or lands in a certain place, passes leasehold property.

(b) The owner of the fee in land on which a stone quarry was situate, having mortgaged and

53. A devise of *the income* of lands is the same in its effect as a devise of the lands.(1)

54. The words *all I am worth* will pass real estate. So the word *property*.(a) So "all my right."(2)

55. The word *legacy* may apply to real estate, if the intent so require.(3)

56. A testator bequeathed to A and B, his son and daughter, pecuniary legacies, payable on their coming of age; then all his realty and personalty to his wife for life, and after her death, one freehold estate to A, and another to B; but if either or both of them should die before the wife, then those *legacies* which were left to them should return to the wife. Held, the word *legacies* embraced the devises of real estate, as well as the pecuniary bequests.(4)

57. "All the residue or remainder of *my effects*," "*my estate*," or "*my property*," passes real estate, especially with the addition of the word *whatsoever* or *wheresoever*; and though subjected to limitations peculiar to personal property. So the words "all the remainder and residue of all the effects, both real and personal, which I shall die possessed of," have been held to pass freehold estates, although a contrary construction was favored by the following arguments and facts. The word *possessed* properly applies only to personal estate, and a devise of "all I shall die possessed of," can pass no real estate acquired after the making of the will, without republication. The testator, in this case, owned *chattels real*, which were sufficient to satisfy the clause "*both real and personal*." A previous life estate was given to the residuary devisee, without waste; which was inconsistent with, and must merge in the fee. The word of disposition used was *bequeath*. On the other hand, there was an introductory clause "as to my worldly substance," indicating an intent to dispose of the whole property.(5)

58. A contrary construction is of course adopted, where a contrary intent appears from the whole will.

59. Devise of pecuniary legacies, and "all the rest and residue of my estate, chattels real and personal—to my wife." The testator had settled all his real estate upon the wife for life, as a jointure. Held, the meaning of the above clause was, "all the rest, &c., *whether* chattels real or personal;" that the words *rest*, &c., referred to the remainder of the property, a part of which was previously given *by the will*; and that as

(1) Reed v. Reed, 9 Mass. 372.

(2) Huxtep v. Brooman, 1 Bro. 437; Rossetter v. Simmons, 6 S. & R. 452; 17 John. 281; 6 Binn. 94.

(3) Newkerk v. Newkerk, 2 Caines, 345.

(4) Hardacre v. Nash, 5 T. R. 716.

(5) Roe v. Harvey, 5 Burr. 2638; Doe v. Chapman, 1 H. Bl. 223; Hogan v. Jackson, Cowp. 299; 3 Bro. Parl. 338; Doe v. Lainchbury, 11 E. 290; Doe v. Trout, 13 E. 394; Morgan v. Surman, 1 Taun. 289; 1 Swift, 138.

leased the quarry, devised it to his son, and directed, "that the rents arising from the quarry be applied to discharge the incumbrances on the same." Held, the rents due at the testator's death passed to the son of the deceased, for the purpose of paying the incumbrances. Emery v. Owings, 6 Gill, 191.

The above clause of the will did not separate the rents from the reversion. Ib.

Held, also, that if the application of the rents had been directed to the payment of the testator's debts, irrespective of the lands out of which they issued, the implication of a devise of the rents to the testator's executor could not have sufficed. Ib.

(a) A testator devised his "property," and referred to the income by the words "dividends" and "interest." Held, his real estate was included in the word "property," notwithstanding the use of the other words. Morrison v. Hoppe, 5 Eng. Law & Eq. 199.

no real estate was thus previously given, the wife did not take the reversion of the jointure lands.(1)

60. Devise, "all my freehold lands, &c., with the messuages, &c., in the town of L; and all other *the rest, residue and remainder* of my estate, consisting in money, plate, &c., leases, judgments, &c., to A and her assigns forever." Held, the enumeration of articles of personal property, and the express mention of one parcel of real estate, precluded the application of these words to any other.(2)

61. A testator bequeaths articles of furniture, and other personal property, and proceeds to "give and bequeath to A all the residue of my furniture and estate," &c. The testator was in possession of personal articles, not included in the specific bequest. Held, the real estate did not pass by the will.(3)(a)

62. With regard to the terms of description of property devised, there seems to be no material difference between the rules of law as to devises, and those, already stated, relating to deeds. These are substantially, that where the property is first specifically described, erroneous words of addition will not affect the devise; but where the first description is general, it may be restricted or explained by additional words.(b)

63. Devise of "the house or tenement wherein W dwelleth, called *the White Swan*, in Old Street." W occupied *the alley* of the house, and three upper rooms. Held, the whole house passed. Otherwise, it seems, if the devise had been merely of "the house wherein W dwells."(4)

64. Devise of lands lying in the parish of B, and in a street there called C street. There was no such parish as B, but the testator owned land in B street. Held, a good devise.(5)

65. Devise of "all my lands in B, in the county of S, in the possession of J A." The testator had no lands in S, but he had lands in possession of J A, at B, in the county of H. Held, these lands passed.(6)

66. Devise of "all the manors, &c., *advowsons*, farms, &c., in the county of H, for the purchase whereof I have already contracted and agreed." The testator owned one advowson in this county, and had contracted for another. Held, (in reversal of the judgment of the C.

(1) *Markant v. Twisden*, 1 Abr. Eq. 211.

(2) *Timewell v. Perkins*, 2 Atk. 102; *Camfield v. Gilbert*, 3 E. 516; *Goodtitle v. Miles*, 6 E. 494; *Doe v. Weatherby*, 11, 322; *William v. Thomas*, 12, 141.

(3) *Bullard v. Goffe*, 20 Pick. 252.

(4) *Chamberlaine v. Turner*, Cro. Cor. 129; *Blague v. Gold*, Cro. Car. 447. See *ante*, ch. 84, sec. 127, n.

(5) *Pacy v. Knolls*, Brownl. 131.

(6) *Hastead v. Searle*, 1 Ld. Raym. 728.

(a) After various bequests of furniture and chattels, a will proceeded to "give and bequeath to B all the residue of my furniture and estate, whatever and wherever it may be." No other property was described in the will but personal chattels, nor were there any words showing an intention of disposing of the testatrix's whole property. There were also some articles of furniture and other personal property, not specifically disposed of. Held, the real estate did not pass. *Bullard v. Goffe*, 20 Pick. 252.

(b) See *Harris v. Harris*, 1 Met. 400. Words of description following a general devise will not be construed as restrictive, where they would thus render such devise inoperative, and where they may be rejected as a *false demonstration*. *Campton v. Carpenter*, 1 Eng. L. & Eq. 307.

C. P.) that the former as well as the latter passed, the word used being plural. (Lord Chancellor Apsley and Lord Camden dissenting.(1)

67. Devise of a farm "in the tenure and occupation of A." A part of the farm was not occupied by A. Held, the whole farm passed.(2)

67 *a*. A devised to the lawful heirs of his son B, all the lands and real estate, situated in the county of Berkshire, which descended to him as the heir-at-law of his father. One of the heirs dying, and her share descending to her father, B, he made a conveyance to C, in the following terms, namely, "all right, title and interest, that I have, or ought to have, to a tract or parcel of land situated in Great Barrington, *being the same that was bequeathed by my father, A, deceased, to my children.*" Held, that these terms were not sufficient to pass an estate in Sheffield, although A possessed an estate there, which was included in the devise to the children of the grantor.(3)

68. Words, technically applicable only to a kind of property which the testator did not own, may be applied to such as he did own. Thus, *the manor of A* may pass a fee-farm rent issuing therefrom. *Freehold houses in A* may pass leasehold houses. It was formerly held that such construction will not be given, where the testator had property of a kind which strictly satisfies the terms of the devise. Thus, "messuages, lands, tenements, hereditaments and real estate," &c., will not pass a mortgage for years, or an *extended* interest, where the testator owned lands in fee also, and a subsequent clause of the will disposes of the "rest, &c., of his *personal estate*," mortgages, &c. But in late cases this doctrine has been ascribed to the old idea of the dignity of the freehold, and declared to be now unsatisfactory. Thus, where the leasehold property was perpetually renewable, and was with difficulty to be distinguished from freehold by reason of unity of possession, and the words "possessed of or interested in" were used in the devise, it was held, that the words "messuages, lands and tenements," though one of the limitations was made to *heirs*, passed the freehold estate. So the words "manors, lands, tenements, mines of coal and lead, rents and hereditaments," have been held to pass leasehold property, the terms of the residuary clause being favorable to this construction. So where a testator, seized of tithes in fee, and having others for years, perpetually renewable, devised "all his lands, tenements, tithes," &c., it was held that the leasehold tithes passed by the will. There are other cases, however, where the old rule has been adhered to. Thus, where one having freehold estates, and two terms, devised "all his manors, and all and every his several messuages, lands, tenements and hereditaments, &c., which he was seized of, interested in, or entitled to, &c., to his son for life, with impeachment for all wilful waste, then to the heirs of his body;" held, there being no other clause indicating an intent to include the terms, they did not pass. But it has been held, that where there was a devise of "manors, messuages, houses, farms, &c., hereditaments, and real estate," with limitations peculiarly applicable to real estate, followed by a disposition of all the rest and residue of "ready money, rents, &c., and personal estate;" a part of a farm immemorially

(1) Hill v. St. John, Cowp. 94; 2 Bl. R. 255. (See Doe v. Roe, 1 Wend. 541; 1 Harr. 930; 3 Bro. Parl. 375. See Lincoln v. Arce-deckue, 1 Coll. 98.) & Woll. 439.)

(2) Paul v. Paul, 2 Barr. 1089; 1 Bl. R.

(3) King v. Little, 1 Cush. 436.

held by a renewable church lease, in connection with another part of the farm, which was a freehold, passed under the former clause; the intention being clear to give all the landed property by the former, and all the personal by the latter clause, and the word *farms* being strictly applicable to a *tenancy*. But in a still later case in Chancery, where the devise was of "all manors," &c., tenements and hereditaments," to trustees and their heirs, to the use of sons in tail, &c., remainder over, and a subsequent bequest of personalty; it was held, that the rule established in *Rose v. Bartlett*, (Cro. Car. 292,) must be adhered to, and that short terms held by the testator, unconnected with any freehold interest, did not pass by the former clause.(1)

69. *Reversionary estates* will pass by devise under a general clause, where an intention appears to dispose of the testator's whole property. Thus, if land be devised for years, the reversion of such land will pass under a residuary disposition of "*the rest of my lands*," or "*all my lands not devised*."(2) So a reversion passes under the terms "*lands, tenements and hereditaments*," or "*all my lands out of settlement*," or "*not by me formerly settled*," &c.(3) General residuary words will carry a reversion, unless expressly excepted, or unless there is a manifest intent to the contrary; as where the residuary property is to be sold immediately for payment of funeral expenses, and the reversion is expectant upon an estate tail, and therefore not saleable.(4)

70. By what terms in a will *mortgages* will pass, is a subject of various and conflicting decisions.(a) It was formerly held, that "all my mortgages" would pass mortgages of real estate; but afterwards, that these terms embraced only mortgages *for years*, especially where a mortgage in fee was forfeited, the devise connected with a disposition of chattels, and the word *possessed* used. But a mortgage in fee has been held to pass under a devise of "*all the residue of my estate*," to A; the testator having had both lands and mortgages, and devised all the former to B, and given several legacies. The modern doctrine is, however, that mortgages, though forfeited, do not pass under a devise made in terms which are peculiarly applicable to real estate, if the testator had other property which satisfies those terms. Otherwise, if he

(1) *Inchley v. Robinson*, 3 Leon. 165; *Day v. Trig*, 1 P. Wms. 286; *Davis v. Gibbs*, 3 P. Wms. 26; *Addis v. Clement*, 2 P. Wms. 456; *Lowther v. Cavendish*, Amb. 356; *Turner v. Husler*, 1 Bro. 78; *Knotsford v. Gardiner*, 2 Atk. 450; *Pistol v. Riccardson*, 1 H. Bl. 26, n.; *Lane v. Stanhope*, 6 T. R. 345; *Thompson v. Lawley*, 5 Ves. 476; (*Edwards v. Barnes*, 2 Bing. N. R. 252; *Doe v. Llewellyn*, 2 C. M. & R. 503; *Cursham v. Newland*, 459, n.; 2 S.-ott, 113.)

(2) *Wheeler v. Walroone*, Aleyn, 28; 3 P. Wms. 63, n. E; *Cooke v. Gerrard*, 1 Lev. 212; *Rook v. Rook*, 2 Vern. 461; *Willows v. Lydcot*, 2 Vent. 285; *Lydcott v. Willows*, 3 Mod. 229.

(3) *Dalby v. Champernoon*, Skin. 631; *Falkland v. Lytton*, 3 Bro. Parl. 24; *Strode v. Russell*, 2 Vern. 621; *Chester v. Chester*, 3 P. Wms. 56; *Glover v. Spendlove*, 4 Bro. 337; *Freeman v. Chandos*, Cowp. 363; *Atkyns v. Atkyns*, Cowp. 808; 3 Bro. Parl. 408; *Doe v. Meakin*, 1 E. 456. But see *Kenyon v. M'Roberts*, 1 Wash. 112.

(4) *Goodright v. Downshire*, 2 Bos. & P. 600; *Doe v. Weatherby*, 11 E. 322; *Teatt v. Strong*, 2 Burr. 912; 3 Bro. Parl. 219; *Roe v. Avis*, 4 T. R. 605; *Mostyn v. Champneys*, 1 Bing. N. R. 341; *Doe v. Thomas*, 1 Scott N. 359.

(a) Devise, "of all my real and personal estate, after payment of debts and funeral expenses." Held, not to include mortgages in fee, made to the testator. *Doe v. Lightfoot*, 8 Mees. & W. 533.

had not. Thus, in such case, "all his freehold messuages, and garden grounds at A," will pass a mortgage.(1)(a)

71. With regard to trust estates, the general rule seems to be settled, that they will pass by the usual general words in a will passing other estates, unless it is to be collected from the expressions in the will, or the purposes and objects of the testator, that he intended otherwise.(2)

72. Equities of redemption pass by the same words as other real estates.(3)(b)

CHAPTER XCVII.

EXECUTORY DEVICES.

1. THE subject of *executory devises* is one of much importance, as well as much intricacy and difficulty. It is nearly allied, however, to that of *contingent remainders*, and has been therefore incidentally noticed to some extent in the former volume, in connection with the latter title. (pp. 518 & *sequ.*) It has also been noticed in the same way in that volume, in treating of the words necessary to create estates, (pp. 622 & *sequ.*) It may be further remarked, that the decisions in the books, relating to executory devises, though very numerous, involve comparatively few distinct *principles*, and turn for the most part upon the particular phraseology made use of in each case. For these reasons, the subject will be treated more concisely than most of the topics which have been considered in the present work.

2. An executory devise, is a limitation by will of a future contingent interest in lands, contrary to the rules of limitation of contingent estates in conveyances at law. If the limitation conforms to the rules regulating contingent remainders, it is a remainder, not an executory devise. This is the construction wherever a remainder is limited upon a preceding freehold.(4)

3. An executory devise is not a mere *possibility*, but a certain and substantial interest and estate. It is a stable and unalienable interest,

(1) *Wilkinson v. Merryland*, Cro. Car. 447; *Winn v. Littleton*, 1 Vern. 3; *Strode v. Russell*, 2 Vern. 621; *Casborne v. Scarfe*, 1 Atk. 605; *Clarke v. Abbot*, 2 Abr. Eq. 606; *Balard v. Carter*, 5 Pick. 112. See *Hyde v. Baldwin*, 17 Pick. 303.

Lit. 205 & n.; *Atty. &c. v. Buller*, 5 Ves. 339; *Braybroke v. Inskip*, 8, 417; *Roe v. Reade*, 8 T. R. 118. See *Bainbridge v. Ashburton*, 2 Y. & Coll. 347.

(3) *Philips v. Hele*, 1 Cha. R. 101.

(4) 4 Kent, 263; *Doe v. Morgan*, 3 T. R.

(2) *Jackson v. Delancy*, 13 John. 555; Co. 763.

(a) The following devise, "I leave my wife, R. H., to receive all moneys upon mortgages," gives the wife the legal estate in the mortgaged premises. *Guest v. Bennett*, 5 Eng. Law and Eq. 536.

A testatrix devised two lots of land, describing them, which lots she had sold and conveyed previous to making the will, and then held bonds and mortgages thereon for the unpaid purchase money. Held, the bonds and mortgages passed to the devisee. *Woods v. Moore*, 4 Sandf. 579.

(b) In Massachusetts, a testator, at the time of making his will, before the Revised Statutes took effect (which enable a testator to devise after-purchased lands) held land in mortgage. He devised all his real estates, and afterwards foreclosed the mortgage. Held, the mortgaged land did not pass. *Brigham v. Winchester*, 1 Met. 390. See further as to the subjects of this chapter, 5 Wend. 224; 9 Pick. 293; 14, 399; 12, 436; *Allen v. Richards*, 5, 512; 2 Ohio, 386; 5 Nev. & M. 391.

or a species of entailed estate, to the extent of the authorized period of limitation.(1)

4. It is said, that a few imperfect examples of executory devices have been gleaned from the oldest authorities; but this species of limitation may be considered as having arisen since the statute of uses and of wills.(2) It was first decided in *Pells v. Brown*,(3) that a fee might be limited upon a fee in this form, and should not be subject to a common recovery. The contingency, however, was restricted to the duration of one life, and Doddridge, J., dissented, on the ground of discouraging perpetuities. In subsequent cases,(4) the principle was extended to several lives in being at the same time, upon the ground that they were all wearing out at once, or *all the candles lighted together*.

5. In the great case of the Duke of Norfolk,(5) the judges, who were called in to aid Lord Chancellor Nottingham, held a limitation of a term after an estate tail to be invalid, as creating a perpetuity; but the Chancellor maintained a different doctrine, which was affirmed in the House of Lords. This case led to the practice of a strict settlement of terms by executory devise, for lives in being and twenty-one years afterwards. Other cases restricted the period to lives in being, and, in one, the addition even of one year was expressly disallowed; but this decree was reversed.(6) Another case(7) extended the right to a posthumous child; although Chief Justice Treby dissented, and held to the restriction to *one life*. The doctrine was finally settled, that a limitation may be made to depend upon lives in being, and reach twenty-one years afterwards, an extension designed to meet the exigency of a child's minority; with the addition of several months, to reach the case of a posthumous child.(8) In a late case,(9) it is held, that the additional period of twenty-one years is allowable, without reference to the minority of any party interested.

6. Devise to trustees, in trust for the wife for life, then for the grandchildren of B, in equal proportions, when they should attain the age of twenty-five years. The wife of B survived the testator. The wife died; eight grandchildren survived her, and several were born afterwards. Held, the devise was not void for remoteness, but the grandchildren born after the wife's death took nothing.(10)

7. In New York, by the Revised Statutes,(11) the absolute power of alienation cannot be suspended beyond the lives in being at the creation of the estate, except in case of a contingent remainder in fee, which may be limited upon a prior remainder in fee, to take effect in case the former remainder-men shall be under age, or upon any other contingency by which the estate of the former remainder-men may be determined during minority. Chancellor Kent says,(12) these statutes have destroyed the distinction between contingent remainders and executory

(1) 4 Kent, 263-70.

(2) 4 Kent, 264; *Thellusson v. Woodford*, 4 Ves. 249-264.

(3) Cro. Jac. 590.

(4) *Snowe v. Cutler*, 1 Lev. 135; *Goring v. Bickerstaffe*, Pollexf. 31.

(5) 3 Cha. Cas. 1; Pollexf. 223.

(6) *Scatterwood v. Edge*, 1 Salk. 229; 12 Mod. 278; *Lloyd v. Carew*, Prec. in Cha. 72; *Shower*, 137.

(7) *Luddington v. Kime*, 1 Ld. Raym. 203.

(8) *Stephens v. Stephens*, 2 Barn. K. B. 375; Cas. Temp. Tal. 283; *Atkinson v. Hutchinson*, 3 P. Wms. 258.

(9) *Cadell v. Palmer*, 1 Clark & Fin. 373; 10 Bing. 140.

(10) *Kevern v. Williams*, 5 Sim. 171.

(11) 1, 723. See *Vail v. Vail*, 7 Barb. 226; *Tator v. Tator*, 4, 431.

(12) 4 Kent, 271-283.

devises, which may now alike be created by grant or by will. They are also alike applicable to real and to personal property.

8. A trust estate, limited to the minority of two or more infants in being, and having an interest therein, may be valid; for such limitation cannot suspend the power of alienation for more than twenty-one years, and the short subsequent period allowed for a posthumous child.(1)

9. Devise to trustees in fee, in trust to receive the rents and profits, and pay over and divide the same equally between twelve nephews and nieces, and the survivors and survivor of them, for their respective lives; and after their deaths, remainder in fee to the children of them living, and the children of those dead *per stirpes*. The effect of this limitation was, that the trustees could not sell the estate, (being prohibited by the provisions of the Revised Statutes as to trusts.)(2)

10. There are two kinds of executory devises relative to real estate, and a third relative to personal estate. 1. Where the deviser parts with his whole estate, but upon some contingency qualifies the disposition of it, and limits an estate on that contingency. Thus, if there is a devise to A for life, remainder to B in fee, provided that if within three months from the death of A, C pay B a certain sum, then to C in fee; this is an executory devise to C, and if he dies living A, his heir may claim it.(a) 2. Where one devises a future contingent interest, leaving the fee in the meantime undisposed of. 3. Although formerly held otherwise, it is now settled that there may be a valid executory bequest of a term for years, even to a person not in *esse*, and the first taker has no control of it beyond his own life.(3)

11. The distinctions between an executory devise and a contingent remainder, are, first, that by the former *a fee may be limited upon a fee*; and, secondly, that by executory devise, a freehold estate may be limited *in futuro*, with no preceding estate to support it; neither of which, as has been seen,(4) can be done in case of remainder.(b)

12. An executory devise must be wholly beyond the control of the party who has the preceding estate. Hence, any expressions in the prior limitation, which imply a power in the prior devisee to dispose of the whole estate, render the executory devise void. As where the estate is devised to A in fee, and *if he dies possessed* thereof, to B; or where the devise over is of property which *A shall leave*.(5)

(1) 4 Kent, 271, n.; *Hawley v. James*, N. Y. July, 1835.

(2) 1 Rev. St. 730.

(3) 4 Kent, 268-9; 1 Salk. 229; *Marks v. Marks*, 10 Mod. 419; *Bate v. Amherst*, T. Raym. 82; 1 Eq. Cas. Abr. 191, pl. 2.

(4) Vol. I, *Remainder*. See *Morgan v. Morgan*, 5 Day, 517.

(5) *Jackson v. Bull*, 10 John. 19; *Atty. Gen. v. Hall*, Fitzg. 314; *Ide v. Ide*, 5 Mass. 500; *Jackson v. Robin*, 16 John. 537.

(a) But for the provision that C is to take *after A's death*, this might be a good *contingent remainder*.

(b) Devise to a daughter, her heirs and assigns, "if any of my daughters die without heirs of their body, their part to be equally divided between the survivors of them and my grandchildren, counting A's children as one, and B's children as one." Held, an executory devise to the grandchildren and surviving daughters, and not a remainder which could be barred by the first taker; and that the devise over to the grandchildren was subject to no contingency of survivorship, but vested in those living at the testator's death, and passed by descent upon their death, living the first devisee. *Johnson v. Currin*, 10 Barr, 498.

Devise to a wife "during her natural life and at her decease to be left to my son A." The estate vests immediately in the son, as an executory devise. *Favley v. Gilmer*, 12 Alab. 141.

13. An executory devise cannot be divested, in England, even by a reversion; nor, if expectant upon a fee, by a recovery. Otherwise, where the prior limitation is in tail.(1)

14. Subsequent circumstances may change an executory devise into a remainder.(2)

15. If an executory devise be limited upon the death of a party *without heirs or issue, or on failure of issue, or without having issue*, it cannot take effect till after an indefinite failure of issue, and is therefore void as being too remote. But a limitation on failure of issue of the first taker, *living at his death*, is valid, because the contingency terminates at such death. Whether the above or similar expressions are to receive the one or the other of these constructions, is a question upon which a great number of cases both in England and in the United States have turned. *Failure of issue* is said to be either *definite* or *indefinite*; the former, when the will fixes a certain time for such failure, as, for instance, of *issue living at A's death*; the latter, when no time is fixed, but the contingency continues so long as A has any *issue* or *descendants*; and this is void as a *perpetuity*. A devise in fee, remainder over upon indefinite failure of issue, is an estate tail. But as entailments are discouraged by the law, the courts have in many cases leaned against this construction of a devise, though conformable to the intent, and held the failure of issue referred to, to be at the death of the first taker. The current of authorities is, however, in favor of an estate tail, especially where the expression "lawful issue," is used, upon the ground that in no other way can the estate pass to the issue for an indefinite period. Thus, a devise to A, and, if she die without issue, to B, gives an estate tail to the issue of A. So a devise to a son and daughter in fee, but, if they should happen to die without having any child or issue lawfully begotten, remainder over, gives the son, &c., an estate tail. So where there was a devise to the sons, and, if either should die without lawful issue, his part to be divided among the survivors, held, the land given to each son should be enjoyed by his family, so long as any branch of it remained, but that the right of the others to take his share did not depend upon his dying without a child *living at that time*.(3)(a) The English rule

(1) *Pells v. Brown*, Cro. Jac. 590.

(2) *Doe v. Howell*, 10 Barn. & Cr. 230.

(3) *Jeffery v. Sprigge*, 1 Cox, 62; *Pleydell v. Pleydell*, 1 P. Wms. 750; *Tenny v. Agar*, 12 F. 253; *Bells v. Gillespie*, 5 Rand. 273; *Caskey v. Brewer*, 17 S. & R. 441; *Sonday's*

case, 9 Co. 127; *Hope v. Taylor*, Burr. 268; *Doe v. Fonnereau*, Doug. 504; *Bartow v. Salter*, 17 Ves. 479; *King v. Rumbail*, Cro. Jac. 448; *Brice v. Smith*, Willes, 1; *Doe v. Walker*, 2 Mann. & G. 113. See *Lovett v. Buloid*, 3 Barb. Ch. 137.

(a) Whether, where a devise is made to A in fee, and, if he should die and have no male issue, then over, the limitation over is void by way of executory devise, on account of its remoteness, *quære*? *Bell v. Scammon*, 15 N. H. 381.

If the words importing a failure of issue are restrained to issue living at the death of the first taker, the limitation over is good. *Ib.*

The words are thus restrained, when the death of the first taker is confined to a given age. And, where there was a devise in fee, but, if the devisee "should die before he arrives to the age of twenty-seven years, and have no male issue," then over; the limitation over was held valid. *Ib.*

And where a testator devised to his son in fee, but if he should die before he arrived at the age of twenty-seven years, and have no male issue, then that the testator's daughters should have two-third parts of the land, and his son's heirs the remaining third part; held, the limitation over to the daughters was valid, because the testator, by referring to the heirs of his son, meant to designate his death as the period when the limitation to the daughters should take effect, and thus the failure of issue was restrained to issue living at the death of the first taker. *Ib.*

upon this point is generally adopted in this country, though perhaps subject to modification by peculiar additional expressions in the will.(1) The construction is in general the same, in England, though the terms of the contingency are "without *bearing issue*," or, in case of a devise to two or more, that "if either should die without issue, *the survivor* should take."(2) But if the limitation over is upon the first taker's dying "without issue *living*," or, "without leaving issue *behind him*;" this is an executory devise, which takes effect upon his dying without children *at his death*.(3) And in Connecticut, the same construction has been given, where the limitation was upon the party's "dying *without children*," and to *his brothers*. So in New Jersey, where the devise was, if any of the children should "die without issue alive," *to the survivors*. So in New York and in the United States Supreme Court, where the words were "without lawful issue," then to the survivor.(4)

16. In Virginia, by Statute of 1819, a limitation, made upon the death of a person without heirs, heirs of the body, issue, or issue of the body, takes effect upon his dying without heirs or issue living at that time, or born within ten months thereafter.(5)

17. In New York, by the Revised Statutes, a remainder in fee, limited upon an estate which would be a fee tail in England, makes a *contingent limitation* upon a fee, and takes effect upon the party's death without issue, then living; and a death without *heirs, issue, &c.*, means that they should be living *at that time*. But a posthumous child takes like others.(6)(a)

(1) *Ide v. Ide*, 5 Mass. 500; *Dallam v. Dallam*, 7 Harr. & J. 220; *Newton v. Griffith*, 1 Harr. & G. 111; *Sydnor v. Sydnor*, 2 Munf. 269; *Hill v. Burrow*, 3 Call, 342; *Bells v. Gillespie*, 5 Rand. 273; *Broadbudd v. Turner*, 308; *Denn v. Wood*, Cam. & Nor. 202; *Cruger v. Hayward*, 2 Desaus. 94; *Irwin v. Dunwoody*, 17 S. & R. 61; *Ib.* 441; *Paterson v. Ellis*, 11 Wend. 259.

(2) *Forth v. Chapman*, 1 P. Wms. 663; *Den v. Shenton*, 2 Chit. 662; *Romilly v. James*, 6 Taun. 263; *Daintry v. Daintry*, 6 T. R. 307; *Carr v. Porter*, 1 McCord's Cha. 60; *Newton v. Griffith*, 1 Harr. & G. 111; *Carr v. Green*, 2 McCord, 66-75; *Chadock v. Cowly*, Cro. Jac. 695; *Bells v. Gillespie*, 5 Rand. 273.

But see *Ranelagh v. Ranelagh*, 2 My. & K. 441; *Den v. Cox*, 3 Dev. 394.

(3) *Pells v. Brown*, Cro. Jac. 590; *Porter v. Bradley*, 3 T. R. 143; *Hughes v. Sayer*, 1 P. Wms. 533; *Roe v. Jeffrey*, 7 T. R. 589; *Doe v. Webber*, 1 Barn. & Ald. 713.

(4) *Morgan v. Morgan*, 5 Day, 517; *Den v. Schenck*, 3 Halst. 29; *Anderson v. Jackson*, 16 John. 382; * *Wilkes v. Lion*, 2 Cow. 333; *Jackson v. Chew*, 12 Wheat. 153. See *Couch v. Gorham*, 1 Conn. 36; *Ackless v. Seekright*, 1 Bre 46; *Macomb v. Miller*, 9 Paige, 265; *Cutter v. Doughty*, 23 Wend. 513; *Miller v. Macomb*, 26 Wend. 229.

(5) 4 Kent, 279.

(6) 1 N. Y. Rev. St. 722, 4.

* This case is said to have been "a step taken in advance of all preceding authority," and to have "shifted and disturbed titles in the city of New York, to a very distressing degree." 4 Kent, 278, n.

(a) Devise to a son of the testator, and if he die without heirs lawfully begotten, then to three other sons in fee. Held, the executory devise was limited to an indefinite failure of issue, and therefore void. *Tator v. Tator*, 4 Barb. 431.

Devise to A and her heirs, forever, and if she dies "without leaving lawful issue," the reversion to B and C and their heirs forever. Held, a devise on an indefinite failure of issue, and void, as an executory devise, and that A took an estate tail, by implication, at common law. *Morehouse v. Cothoal*, 1 N. J. 480.

A will, devising real estate for minor children, with the direction that it should not be sold or divided, until the youngest surviving child should become of age, was held to be void, as it suspended the absolute power of alienation, contrary to law. And the implied power, under such will, authorizing the executors to receive the rents and profits of said real estate, and apply them as therein directed, dividing the surplus among the four children, equally, was held to be co-equal with the limitation of the real estate, and therefore void.

18. In case of an executory devise, the estate descends till the contingency happens, or passes by a general residuary devise. Trustees hold for the benefit of the heir. So, where there is a prior, particular interest, which terminates before the happening of such contingency, the heirs take the intermediate profits. If such profits are bequeathed, the heirs take them as trustees.(1)

19. A person to whom an executory devise is made, may assign or devise his interest. It will also pass by descent.(2)

20. In the great case of *Thellusson v. Woodford*,(3) it was settled, that there is no limited number of lives, after which an executory interest may vest. There may be an indefinite number of concurrent lives, and yet the limitation is in fact dependent only upon the life of the survivor. The object may be merely accumulation, and no interest given to the parties for whose lives such accumulation is to take place; and the limitation will be good, if made after any number of lives in being, and twenty-one years, and the usual period of gestation afterwards. In this case, the devise was made by A to the trustees in fee, to receive the profits for the lives of all his sons and grandsons born in his life, or living *in ventre*, &c., at his death, and invest them in other lands. Upon the death of the last of these descendants, the lands to be conveyed to the branches of the respective families of the sons, who should then be the heirs male of the bodies of the sons.(a)

21. In New York, by the Revised Statutes, an accumulation of rents

(1) Pay's case, Cro. Eliz. 878; *Hayward v. Stillingfleet*, 1 Atk. 422; *Hopkins v. Hopkins*, Cas. Temp. Tal. 44; *Stephens v. Stephens*, Ib. 228; *Rogers v. Ross*, 4 John. Cha. 388.

(2) *Pinbury v. Elkin*, 1 P. Wms. 563; *Goodright v. Searle*, 2 Wils. 29; 1 N. Y. Rev. St. 725; 2 Saun. 388, k. n.
(3) 4 Ves. 227; 11, 112.

McSorley v. McSorley, 4 Sandf. Ch. 414. See *McSorley v. Wilson*, 4 Sandf. Ch. 515; *Field v. Field*, 4 Sandf. Ch. 528.

Although an executory devise is void, where it is repugnant to the absolute ownership, and power of disposal given to the first taker, it is otherwise when the *jus disponendi* is conditional. *Hill v. Hill*, 4 Barb. 419.

Devise to A, his heirs and assigns, forever, and if he should die without lawful issue, and without leaving a will, or by will or otherwise, after the date of the devise, give anything to B, the testator's son-in-law, or his descendants, the lands to go to certain charities. Held, A took an estat. in fee; that there was a valid executory devise, dependant upon a definite failure of issue; and if the condition subsequent were void, as against good morals, or public policy, only the limitation over would be defeated. *Trumbull v. Gibbons*, 2 N. J. 117.

Devise to a son in fee, provided, "if he die without child or children, the real estate, &c., shall be divided equally among my grandchildren, share and share alike." Held, a good executory devise to the grandchildren, the son dying without leaving children. *Sherman v. Sherman*, 3 Barb. 385.

Devise of real and personal property, in trust for "A during her natural life, and upon her demise, then the said property is to go to the heirs of her body, if any;" "should she die without issue, but having a husband, then to the husband;" but should she "die without leaving issue or husband," then over to a public school. Held, the limitation over was void as to the real estate, but whether void or not, she took a fee conditional. *Hull v. Hull*, 2 Strobb. Eq. 174.

Where an executory devise, limited upon the first taker's dying without lawful issue, was made subject to the payment, by the executory devisee, of legacies to three persons, then in being, when they should severally become of age, it was held, that the will did not contemplate an indefinite failure of issue, but a failure at the death of the first taker. *Hill v. Hill*, 4 Barb. 419.

(a) By St. 39 & 40 Geo. III, ch 95, property cannot be settled, for the purpose of accumulation, by means of rents, &c., beyond the life of the settler, or twenty-one years thereafter, or during the minority of any one, living at his death, who, under the settlement would, if then of age, be entitled to the rents, &c.

&c., must commence, either on the creation of the estate whence they arise, for the benefit of an infant then living, and to end upon his coming of age; or within the time prescribed for the vesting of expectancies, and only during the minority of those interested. Whenever the power of alienation is validly suspended, the rents, &c., go to the next presumptive owner.(1)(a)

CHAPTER XCVIII.

CHARITABLE DEVISES.

1. It has been stated, generally, (ch. 94,) that a devise may be *void for uncertainty*. There is a class of devises, however, which constitute an exception to this general principle, and are so highly favored by the law, as not to be rendered void by the same uncertainty which would avoid ordinary testamentary dispositions. These are called *charitable devises* or *charities*, and constitute a very interesting and important branch of the law, and more especially of equity jurisprudence. But, as they have no peculiar connection with *real property*, the subject does not require a full and detailed exposition in the present work.

2. The law of charities is usually traced to *the civil law*, by which all legacies, destined for works of piety or charity, whether relating to spiritual or temporal concerns, were entitled to peculiar favor, and deemed privileged testaments, and carried into effect, however vague and uncertain in respect to either persons or objects. Many of the privileges attached to pious legacies have been for ages incorporated into the English law; but the history of the law of charities, prior to the Statute of 43 Eliz. ch. 4, which is called the Statute of *Charitable Uses*, is said to be very obscure. This statute conferred upon the Court of Chancery very extensive powers, and peculiar modes of jurisdiction, for the enforcing of charitable bequests. The question, whether the statute introduced wholly new doctrines and remedies, or merely affirmed and perhaps enlarged those which existed before, has been rendered an important one in this country, by the doubts often raised as to the adoption of this act into American jurisprudence, and consequently as to the validity of uncertain bequests. In Virginia, the statute was at first adopted, but afterwards expressly repealed.(b) In New Hampshire, Vermont, Maryland, Connecticut, New York,(c) New

(1) 1 N. Y. Rev. St. 726. See *Vail v. Vail*, 4 Paige, 317.

(a) A limitation upon minorities is virtually a limitation upon lives. *Taylor v. Gould*, 10 Barb. Sup. Ct. 388.

(b) If ever in force, it was repealed in 1794. *Wheeler v. Smith*, 9 How. 55.

Thus, a bequest by a resident of Alexandria, to trustees, for such purposes as they should consider promised to be most beneficial to the town and trade of Alexandria, is void, even if not too indefinite to be sustained by the statute. *Ib.*

(c) In New York, the Statute of Elizabeth was repealed in 1788. *Ayres v. Methodist, &c.*, 3 Sandf. 351.

In that State, equity has not the unlimited discretion possessed by the king, as *parens patriæ*, in enforcing an indefinite devise. Hence, a devise to a religious society, in trust, for

Jersey, Pennsylvania,^(a) and North Carolina, the general English doctrines, as to charities, seem to have been adopted. In Massachusetts and North Carolina, the Statute of Elizabeth is held to be in force. So in Indiana, with one or two exceptions. Judge Story says, after a full examination of the English authorities and precedents, the facts afford a very strong presumption, that, in case of uncertainty in a devise as to persons and objects, the Chancery jurisdiction rests upon constructions of the Statute of Elizabeth.⁽¹⁾

3. Examples of the liberal construction given to charitable devises are the following. If one bequeath property for charity, to such person as he shall appoint executor, or to such person as the executor shall name, and appoint none; ⁽²⁾ or if an executor or trustee named die; Chancery will still execute the bequest. So where *the mode* of executing a charity fails, or none is prescribed, Chancery will provide a mode, considering the charity itself as the substance. Thus, where one devises to such charitable uses as he shall direct by codicil, which he never makes, the court apply the devise. And it has been held, that where the object pointed out is illegal, the court will select another which is legal, though wholly unconnected with the former; as, for instance, *a foundling hospital*, in place of *a Jewish synagogue*. And, in general, however uncertain and indefinite the persons or objects may

(1) *Wheeler v. Smith*, 9 How. 55; *Pawlet v. Clark*, 9 Cranch, 292; *Trustees, &c. v. Hart*, 4 Wheat, 1; *Beatty v. Kurtz*, 2 Pet. 566; *Inglis v. Trustees, &c.*, 3, 99; *Bartlet v. King*, 12 Mass. 537; 16 Pick. 107; *McCartee v. Orphan, &c.*, 9 Cow. 479; *Witman v. Sex*, 17 S. & R. 89; *McGirr v. Aaron*, 1 Penn. 51; *Griffin v. Graham*, 1 Hawks, 96; *Stone v. Griffin*, 3 Verm. 400; *Burr v. Smith*, 7, 241; 2 Story on Eq. 404, 410; *Mogoffen*

v. Patton, 2 Edw. 65; *Dutch, &c. v. Mott*, 7 Paige, 77; *Moore v. Moore*, 4 Dana, 357; *Trustees, &c. v. Zanesville, &c.*, 9 Ohio, 203; *Gallego v. Atty, &c.*, 3 Leigh, 450; 3 Lom, 12; *Manley v. Wilson*, 1 Bad. & Dev. Eq. 276; *McIntyre v. Zanesville, &c.*, 9 Ohio, 203. *McCord v. Ochiltree*, 8 Blackf. 15; Ky. Sts. 1852, 66; *Zanesville, &c. v. City, &c.*, 20 Ohio, 483.

(2) *Brown v. Kelsey*, 2 Cash. 243.

the support of aged persons, who should reside in a town or village where there was at least one place of public worship, has been held void. *Ayres v. Methodist, &c.*, 3 Sandf. 351.

A bequest to a religious society, as such, is valid as a gift for pious and charitable uses, where there is no doubt as to who was the legatee intended, although the society is not incorporated. *Banks v. Phelan*, 4 Barb. 80.

A testatrix gave \$2,000 to Bishop England, of South Carolina, "in trust for the ladies of the Ursuline Order, residing in Charleston, in the State of South Carolina." When the will was executed, there was an institution in Charleston, incorporated by the name of "The Ladies' Ursuline Community of the City of Charleston," founded by Bishop England, still in existence, and known and spoken of invariably as "The Ladies of the Ursuline Convent," or "Order." And there was not, and had not been, any other similar society, or institution, in South Carolina. Held, the bequest was valid; the circumstances rendering it certain who was intended. *Ib.*

In South Carolina, if a charitable bequest to a religious congregation fail, because the government of the denomination to which it is attached is such, as to prevent its receiving the benefits intended, it by no means follows, that the court would be bound to divert the legacy to other kindred objects. *Attorney-General v. Jolly*, 2 Strobb. Eq. 379.

A testator devised and bequeathed the whole of his estate, real and personal, to his wife for life, and "after her death to the Methodist church, of which she might be a member, at the time of her death, to be appropriated to the uses and purposes which the conference might deem most advantageous for said church more especially." Held, the congregation, of which the wife was a member at her death, was exclusively entitled to the bounty, and not the Methodist church in its general connectional character; and it was referred to a master to report a scheme for the proper administration of the charitable uses so created, receiving proposals from all parties interested. *Ib.*

(a) The *conservative* provisions of the statute are said to be adopted. *Zimmerman v. Anders*, 6 Watts & S. 219. See *Kerlin v. Campbell*, 15 Penns. 500.

be, the court will execute the bequest as nearly as it can, or *cy pres*; as in case of a corporation *not in existence*, or *to the poor*.^(a) So Chancery will supply all technical defects in the instrument by which a charity is created. And a devise to a corporation, if charitable, is valid in England as an appointment, though generally void. But it is said the disposition of modern judges is, to curb the excessive latitude of construction upon this subject. The court will not execute a charity in a manner different from the intention, where this is literally practicable. If not, the general intent will be executed, not in mode, but in substance. In a late case, Lord Eldon states the result of former decisions to be, that where there is a general intention to give to charity, the failure of the mode pointed out will not destroy the charity. So where the persons or objects are uncertain. So if the original funds are more than sufficient for the specified objects, the surplus will be applied to other similar ones. But if the testator had but one particular object in his mind, which fails, as, to build a church at A, the next of kin will take.

4. It is said to have become a general principle in the law of charities, that if the charity be of a general, indefinite, and mere private nature, or not within the scope of the Statute of Elizabeth, it will be treated as void, and the property will go to the next of kin. No bequests are deemed within the authority and subject to the regulation of Chancery, except those enumerated in the statute, or others analogous to them. *Charity*, in its widest sense, denotes all the good affections men ought to bear towards each other; in its more restricted and common sense, relief to the poor. In neither sense is it used in the Court of Chancery. In that court it means only such, as are within the letter and spirit of the statute. Hence, a bequest to A, to be applied "to such objects of benevolence and liberality, as A in his own discretion shall most approve of," was held void; upon the ground that objects of benevolence, &c., were not necessarily *charitable*, and were too indefinite to be controlled or reviewed by the court. Upon similar grounds, a bequest in these words, "in case there is any money remaining, I should wish it to be given in a private charity," has been held void.^(b)

5. Where a bequest is made to charity generally, without trustees, it may be regarded in England as a personal trust, devolved upon the *king*, to be administered by him through the Lord Chancellor. But where the gift is to trustees, with general or designated objects, the Court of Chancery will take upon itself the administration of the charity, and execute it under a *scheme*, to be reported by a master. If a charity is definite, and under the direction of trustees, the administration of it be-

(a) Or to the government of Bengal, to be applied to charitable, beneficial and public works, at and in the city of Dacca, in Bengal, for the exclusive benefit of the native inhabitants, &c. *Mitford v. Reynolds*, 1 Turn. & P. 185. The doctrine of *cy pres* is sometimes applied to devises not charitable. But only in case of absolute necessity to effect the intention. *Verplank v. King*, 3 Hare, 1. See *Winslow v. Cummings*, 3 Cush. 358; *Crafton v. Frith*, 3 Eng. L. & Eq. 164.

(b) A testator bequeathed to A, B and C, the residue of his property, "in trust to be purchased into the funds," for the purpose of "opening new schools, subscribing to those already opened in England, Ireland, Scotland, or elsewhere, and in purchasing land to be let out to the poor at a low rent, and the rent to be applied to any benevolent purpose" the said A, B and C, might think proper. Held, the residue was to be divided into two equal parts, one to be applied to the purposes of education according to a scheme, and the other to be paid over to the next of kin of the testator, that part being obnoxious to the mortmain laws. *Crafton v. Frith*, 5 Eng. L. & Eq. Rep. 201.

longs to them, without control of the king. But Chancery will interfere, upon application of the Attorney-General, or a party, to correct any misuse of the funds.(1) In a late case in Massachusetts, where the donees and several objects were designated, and the trust clear, though the particular objects to be benefited were left in the discretion of the trustees, it was said, they might be called to an account in a suit by the Attorney-General, representing the public. And in a still more recent case it is decided, that a devise to an unincorporated society for charitable uses is valid. The estate descends to the testator's heirs, subject to a trust, by which they are bound, and which the Supreme Court will regulate and enforce. And a bequest for charitable uses to an unincorporated society is valid, whether it transacts its business here or elsewhere.(2)

CHAPTER XCIX.

POWERS.

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| <ol style="list-style-type: none"> 1. Nature and definition of. 4. Kinds and classes of. 12. By what words created. 15. 37. Create a fee, when. 16. Distinction between <i>power</i> and <i>estate</i>. 20. Consideration, whether necessary to. 21. Feoffee and <i>cestui</i> quantity of estate. 22. Perpetuities disallowed. 23. Estate subject to power is <i>vested</i>. | <ol style="list-style-type: none"> 24. Who may execute; survivorship. 31. Implied—executors, sale of land by. 34. Assignment of. 38. Use upon a use. 39. 51. Execution of, <i>relates</i>. 41. How and when executed; right to revoke, &c. 56. Property subject to, whether <i>assets</i>. |
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AT the close of the titles of *Deed* and *Devise*, as alike connected with both of them, may be considered the subject of *Powers*. In the English law, this is a very important and extensive branch of the law of real property; but there have been few decisions, and, except in New York, no considerable statutory provisions, relating to it, in the United States.

1. Powers or authorities, by which one person enables another to do an act for him, are said to have been well known to the common law; as, for instance, a devise that an executor should sell land, or of the land to him to be sold.(3)

2. But, by other authorities, powers are said to be *declarations of trust*, and modifications of future uses, deriving their effect from the statute of uses.(4)

3. A power is defined as an authority, enabling a person to dispose, through the medium of the statute of uses, of an interest, vested either in himself or in another person. The New York Revised Statutes define a power, as an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform. To a feoffment at common law, no power of revocation could be legally

(1) 2 Story on Eq. *Charities*.

(2) *Going v. Emery*, 10 Pick. 119; *Bartlett v. Nye*, 4 Met. 378; *Burbank v. Whitney*, 24

Pick. 146. See *Parker v. May*, 5 Cush. 336; *Andrew v. New York, &c.*, 4 Sandf. 158.

(3) 4 Cruise, 120; Lit. 169; Co. Lit. 113 a.

(4) 4 Kent, 315.

annexed; and a condition could not be reserved to a stranger. To obviate the inconveniences of these strict technical rules, powers were chiefly introduced, particularly in connection with family settlements. They were established in equity before uses were recognized at law.(1)

4. A power is either of *revocation*, or of *appointment*; that is, a party is empowered either to revoke or annul uses already created, or to create or appoint new uses in their stead. The former power does not necessarily imply or involve the latter; but the latter of course necessarily involves the former.(a)

5. An appointment under a power operates to substitute one *cestui que use* for another. The use is future or contingent till the appointment, but then becomes executed by the statute. The owner may either reserve the power to himself as a qualified dominion, distinct from the legal estate, or he may delegate the dominion to strangers.

6. Powers are of three kinds. 1. Powers appendant or appurtenant. These enable a party to create an estate which attaches on his own interest. Thus, if one is tenant for life, with power to lease in possession, any lease made by him must *commence* during his life. The effect of the power is to prevent the lease from terminating by his death.

2. Powers *collateral* or *in gross*, do not attach on the interest of the party, but enable him to create an estate independent of his own. Thus, where one conveys in fee, reserving to himself a power, such power must be exercised upon the estate conveyed. Another instance of this species of power, is where a tenant for life is empowered to dispose of the land after his own death; as, for instance, by settling a jointure, or giving portions to his children. To the same class belongs a power given to a stranger to settle or charge the land for his own benefit.

3. Powers *simply collateral* are those vested in one who has no interest or estate in the land, but is a mere stranger.(2)

7. Where one limits his estate to such uses as he shall appoint by will, and in the meantime to the use of himself and his heirs; he has a qualified fee and a power appendant.(3)

8. A power relating to the land is said to be part of the old dominion, and is therefore favorably expounded; while a collateral power is construed strictly.(4)

9. By some writers, powers have been with more simplicity classified into *general* and *particular* powers; the former, where the selection of the appointee is left to the appointer, the latter, where specific objects are designated by him who creates the power.(5)

10. The New York Revised Statutes classify powers, as general or special, and beneficial or in trust. A *general* power authorizes a conveyance, devise or charge in fee, to any person whatever. A *special* power designates the person, or allows only a less estate than a fee. A *beneficial* power is one in the execution of which the grantee alone is

(1) Clere's case, 6 Rep. 17 b; Sug. on Pow. 82; 1 N. Y. Rev. St. 732.

(2) 4 Kent, 316; Sugd. on Pow. 46, 9, 72, 4, 9; Edwards v. Slater, Hard. 415; 6 Conn. 559; Bloomer v. Waldron, 3 Hill, 361; Addison v. Bowie, 2 Bland, 618.

(3) Clere's case, 6 Rep. 17 b.

(4) Darlington v. Pulteney, Cowp. 263.

(5) Fearn v. Brinkley, 10 B. & C. 347, 88; Humphry's Observations, 83; Sugd. 425; Co. Lit. 271 b, n. 231.

interested. A *general power in trust*, is where some designated third person is to be benefited by the execution, wholly or in part. A *special power in trust*, is one which authorizes dispositions only to some person or class other than the grantee of the power, or for the benefit of such person or class.(1)

11. A leading point of distinction, between naked powers and those coupled with an interest, is, that if the former be exceeded in the act done, it is merely void; while, if the latter are exceeded, the act is void only for the excess, and valid so far as it is authorized by the power.(2)

12. No particular form of words is necessary to create or reserve a power. It may be done by deed or will, and the construction of the instrument will be liberal and equitable, according to the intention of the parties.(3)

13. Thus, where the power is not expressly made applicable to any particular lands; it shall be applied to those which are comprised in the deed.(4)

14. "It shall be lawful for A to alter, &c., any use, and to limit new;" or "after altering, &c., said uses, the fine shall be to the new uses." These words create a power.(5)

15. It has been already stated, (Vol. I, p. 622,) how far the addition of a power of disposal, to an estate created without words of limitation, and therefore constituting only a life interest, has the effect of enlarging such estate into fee. The general rule is, that the devise of land generally, with a power of disposition over it, carries the fee. It has been sometimes said to pass an *equitable* fee. But it is otherwise, where an express estate for life is given, unless the *general intent* of the testator require a fee-simple. But if the estate for life be given to let in estates to strangers, and no specific mode required in the disposition of the fee, there, if the intervening estates do not take effect, the devisee takes the fee. In New York, by the Revised Statutes, the annexing of an absolute power of disposal, without any trust, or of a general and beneficial power to devise the fee, to a life estate or a term for years, gives a fee in relation to creditors and purchasers, but subject to subsequent limitations, in case the power is not executed, nor the land sold for debt. A like power of disposal gives the fee, when conferred on one without any particular estate; subject to future estates, but absolute as to creditors and purchasers. An authority to the grantee, to convey in fee in his lifetime for his own benefit, is an absolute power of disposition.(6)

16. With regard to the difference between an *estate* and a mere *power*, perhaps no more nice distinction has been made, than that connected with a devise to *executors*. The ancient and well settled doctrine is, that a *devise of land to executors to sell* passes an estate in fee; while a *devise that executors shall sell* or even a *devise of the land to be sold by*

(1) 1 N. Y. Rev. St. 732, 4; N. Y. L. April 20, 1830, ch. 320, sec. 11; Grout v. Townsend, 2 Hill, 554; Bloomer v. Waldron, 3 Hill, 361. See Gibbs v. Marsh, 2 Met. 243.

(2) Jenk. 205; 4 Cruise, 120.

(3) Ren v. Bulkeley, Doug. 293; Hawkins v. Kemp, 3 E. 441; Jackson v. Veeder, 11 John. 169; Sug. 96.

(4) Snape v. Tufton, 2 Rolle's Abr. 262.

(5) Moo. 611.

(6) Dalison, 58; 1 Jones, 137; Co. Lit. 9 b; Barford v. Street, 16 Ves. 135; 3 Leon. 71; Doe v. Thonby, 10 E. 438; Reid v. Shergold, 10 Ves. 370; Jackson v. Robins, 16 John. 588; Flintham, 11 S. & R. 16; 1 N. Y. Rev. St. 732.

executors, merely gives the executors a power without an interest. This distinction, however, has been denied by Mr. Hargrave,^(a) who is of opinion that either of the two last named expressions will pass an estate in fee.^(b)

17. In New York, by the Revised Statutes, a devise of lands to executors or other trustees, to be sold or mortgaged, vests no estate in them, unless they are authorized to receive the rents and profits; but it creates a power, subject to the execution of which the lands pass to heirs or devisees.⁽¹⁾

18. In Ohio, a power to executors to sell land when they may think it advantageous, and to distribute the proceeds, is a power with an interest, and entitles them to possession, though the fee descends to the heir.⁽²⁾

19. In Tennessee, an executor merely empowered to sell land cannot maintain ejectment for it.⁽³⁾

20. Although powers, as has been stated, (sec. 2,) can be reserved or conferred only through the medium of uses; yet, a distinction has been made, in regard to them, between different forms of conveyances to use. It has been seen, (ch. 82,) that two kinds of conveyance have been wholly created by the statute of uses; viz., *bargain and sale*, and *the covenant to stand seized to uses*. These require a consideration, to make them valid. For this reason, a general power to lease at the discretion of the donee, contained in such deeds, is invalid; because no consideration can move from the future lessee, at the time the power is created, such lessee not being then designated. But the same principle does not apply to those conveyances to uses, which operate by change of possession—viz., fine and feoffment—and to which no consideration is necessary.⁽⁴⁾

21. It has been already seen, (Vol. I, p. 295,) that the estate of a *cestui que use* can never exceed that of the feoffee. The same principle is applied to uses created under a power. Thus, if land be conveyed to A for life, to such uses as B shall appoint, B can appoint no use beyond a life estate.⁽⁵⁾

22. The principle above stated is only one instance of the well-established general rule, that no estate created under a power shall be valid, which would have been invalid, if created by the original instrument which bestows the power. And any power which tends to a perpetuity is void *ab initio*, so that, the estate passes as if no such power existed.^{(6)(c)}

(1) Year Book, 9 Hen. VI, 13 b, 24 b; Lit. 169; Co. Lit. 113 a. 181 b; Honell v. Barnes, Cro. Car. 382; Yates v. Compton, 2 P. Wms. 308; Bergen v. Bennett, 1 Caines Cas. in Er. 16; Jackson v. Schaubert, 7 Cow. 187; Sug. 104, 8; Co. Lit. 113 a, n. 146; Peck v. Henderson, 7 Yerg. 18; Ferebee v. Proctor, 2 Dev. & B. 439; 2 Dev. & B. Equ. 496.

(2) 1 N. Y. Rev. St. 729. (See Keene v. Deardon, 8 E. 248; 4 Kent, 321.)

(3) Dabney v. Manning, 3 Ohio. 321.

(4) Peck v. Henderson, 7 Yerg. 18.

(5) Goodtitle v. Pettoe, Fitzgerald, 299; Gilb. on Uses, 90-1; Sug. 191.

(6) Duke, &c., v. Earl, &c., 1 Eden, 404.

(a) It is abolished in Pennsylvania, Purd. 300, 1.

(b) It seems, the same instrument may confer a power coupled with an interest as to one estate, and a naked power as to another estate in the same land. Bloomer v. Waldron, 3 Hill, 361.

(c) A testator devised all his estate after payment of debts, funeral expenses, and three small legacies, to his executors, as trustees, for the term of three years, and directed them to accumulate the rents and profits and income during that period; and, at the expiration

23. When a power is void or has expired without being executed, the estate passes as it would if there were no power; and it is now well settled, after protracted and learned discussion, that while the power remains unexecuted, though still subsisting and in force, the estates limited, in case of its non-execution, are not contingent but vested interests.(1)

24. Every person, capable of conveying land, is capable of executing a power. An infant may execute a *collateral* power, but no other; while, on the other hand, a *feme covert* may, without her husband's consent, execute any power whatever, whether conferred upon her before or after her marriage.(a) Of course, a *feme covert* has no greater capacity in this respect than a *feme sole*. The New York Revised Statutes affirm this clear principle, by providing that an *infant feme covert* shall not execute a power. They also provide, that although a power may be *vested* in any one legally capable of holding, it cannot be exercised by any one incapable of aliening, except married women.(2)

25. It is the general rule of law, that a power without an interest, given to several persons, does not survive to a part of them. This rule has been, distinctly and with the requisite qualifications, stated as follows.

26. Where a power is given to two or more persons, not executors, by their proper names, or to two or more persons *nominate* as executors, using the word *executors* as merely *descriptio personarum*, and one dies; the power does not survive. But a power given to several persons by the name of trust, as, *to my executors or trustees*, or several persons

(1) Sug. 141; Doe v. Martin, 4 T. R. 39. See Cunningham v. Moody, 1 Ves. 174.

(2) Sug. 148-55; 1 N. Y. Rev. St. 137, 735; Thompson v. Murray, 2 Hill Ch. 214; Jackson v. Edwards, 7 Paige, 386; Smith v.

Shackleford, 9 Dana, 469; Boyce v. Waller, 1b. 482; Tucker v. Inman, 1 O. & Mar. 82; Lewthwaite v. Clarkson, 2 Y. & Coll. 372; American, &c., v. Wadhams, 10 Barb. 597.

of three years, if the moneys in their hands should not be applied to the erection of a statue to the memory of General Washington, or should be found inadequate for that purpose, he ordered them to be equally distributed among three charitable institutions. Held, the necessary effect of these provisions was, to render the property inalienable during the trust term, not dependent upon lives; that the limitations in favor of the charitable institutions, were a contingent remainder, which could not take effect, if at all, until the expiration of the trust term; and these provisions of the will were illegal and void, within the statute respecting perpetuities. Morgan v. Masterton, 4 Sandf. 442.

(a) Where a *feme covert* makes a writing in nature of a will, in execution of a power; the estate does not vest in the executor, subject to such appointment, but the appointee takes immediately, without his assent. Smith v. Garey, 3 Dev. & B. 49.

Where the terms of a marriage settlement provide for an appointment by the wife "during her intended coverture," an appointment made after the husband's death is invalid. Holliday v. Overton, 10 Eng. L. & Equ. 175.

Where, by a marriage settlement made by a husband upon himself and wife, and to the survivor for life, she had the power of appointing to whom the land should go, in the event of her dying without leaving issue at her death, such disposition to be signified under her hand and seal, or by her last will and testament; and she afterwards united with her husband in a deed, by which she relinquished her right in the land for a valuable consideration, and died without leaving issue; held, such deed was valid, destroyed the wife's power of appointment, and restored to the husband all the rights of property which he had in the land prior to the execution of the marriage settlement. Hume v. Hord, 5 Gratt. 374.

When a particular mode or manner is pointed out, for the disposition of the separate estate of a married woman, in the marriage settlement, she cannot dispose of it in any other way; as where she had the power of disposing of her property by will, with the consent and approbation of her trustee, it was held, that she could not make a valid disposition of it by will, without such consent and approbation. Weeks v. Sego, 9 Geo. 199.

generally, as, *to my sons*, will survive so long as more than one remain (1)(a)

27. A testator ordered, that after the death of his son, his executors should sell his land by the advice of A and B. A died, leaving the son. Held, the executors could not make a valid sale. So a testator devised his real, copyhold and leasehold estates to trustees, their heirs, executors and administrators, upon certain trusts, and authorized his said trustees and the survivor of them, his heirs, executors and administrators, to sell all or any part of his property. The surviving trustee died, having, by his will, devised his trust estates to two persons in fee, and appointed them his executors. They entered into a contract for a sale of a part of the testator's copyhold property. Held, on a special case, that the point was too doubtful to force the title on the purchaser. (2)(b)

(1) Co. Lit. 112 b, 113 a, 181 b; Dyer, 177; Osgood v. Franklin, 2 John. Cha. 19; Sug. 159. See Clay v. Hart, 7 Dana, 7; Robertson v. Gaines, 2 Humph. 367; Simpson, &c., 6 Eng. L. & Eq. 58; Silverthorn v. McKins-

ter, 12 Penn. 67; Styer v. Freas, 15, 339. (2) Lee v. Vincent, Cro. Eliz. 26; 1 Leon. 286; 3, 106; Dyer, 219, pl. 8; Wilson v. Bennett, 5 Eng. L. & Eq. 45.

(a) A power to sell, given by will to several executors, whether in the way of *direction*, or referring it to their *discretion*, must be executed by all who prove the will. Wasson v. King, 2 Dev. & B. 262. Otherwise, if only one acts. 4 Kent, 325, n.; Menkings v. Cromwell, 2 Sandf. 512.

(b) A devise to executors, in trust, of property to be paid over to the *cestui* when it has accumulated to a certain amount, gives them power to sell the property. Putnam, &c., v. Fisher, 30 Maine, 523.

Devise of the rents and profits of the testator's real and personal estate to his wife for life, if she remained his widow. If she married, the executors to let, sell or dispose of his real estate, or so much as the major part of them should think proper, and place the proceeds at interest for the benefit of the widow for life. After her death, the rest of his real and personal estate to be turned into cash and placed at interest for the benefit of his son for life; on her death, his estate to go to his son's children. The widow married, and the son died before her. The executors leased the estate. Held, the power of sale was a discretionary one, and, as there was no longer any object on the death of the widow for converting the realty into personalty, the son's children took it as realty. Slocum v. Slocum, 4 Edw. Ch. 613.

A testator devised in trust for the benefit of his wife for life, to be sold at her decease by his executors, and the proceeds distributed among certain of his children, and appointed his wife an executrix. Held, a sale during her life, she, as executrix, joining with the executors in the deed, was a good execution of the power. Gast v. Porter, 1 Harris, 533. [Coulter, J., dissenting.]

Devise to the testator's three children, two of them married women, to be divided or sold as two out of the three heirs could agree. The husband of one of the children, and another child, were appointed executors. Held, the executors had no power to sell or divide the property. Geroy v. Winter, 1 Halst. Ch. 655.

The following points have been decided upon this subject, in New York.

A power, given by will to executors, to sell the real estate of the testator, if not executed by the executors during their lifetime, does not vest in, and cannot be executed by, the administrator with the will annexed. Dominick v. Michael, 4 Sandf. 374.

An express power to dispose of lands, when not clothed with an estate or interest, is not descendible or transmissible, but terminates with the lives, or, according to the terms of the creation, with the life of the survivor of those in whom it is vested. *Ib.*

There is no exception to this rule. Hence, when a power to sell lands, even for the payment of debts, is given to executors, if it pass to a surviving executor at all, it ceases upon his death, and cannot be exercised by his executor when he makes a will, nor, when he dies intestate, by an administrator with the original will annexed. *Ib.*

Where there is no limitation of the time within which a power given to executors to sell real estate is to be exercised, and no specification in the power of the purposes of its exercise, nor of the uses to which the moneys arising from a sale are to be applied, the general terms of the power are to be restricted, by construing them in subordination to the other trusts and provisions in the will. *Ib.*

Although it may be doubtful whether the words "settle or divide" in a will, taken alone,

28. It has been held in Pennsylvania, that a power to sell, given to executors, survives, though they are individually named; for they take as *executors*.(1)

29. An ancient English statute, (21 Hen. VIII, ch. 4,) provided, that where one or more of the executors decline to act, others may sell. This statute has probably been adopted or re-enacted in most of the United States. The New York Revised Statutes make a similar regulation, and also provide, with regard to powers in general, that all the parties named must join in their execution; but if a part of them die, the rest may validly execute. In Virginia, where an executor renounces, the administrator *cum testamen. annex.*, may execute a power to sell.(2)

30. Where executors take an interest or a trust, in connection with, and depending on, their power to sell; the power survives.(3)

31. The prevailing doctrine is, that where a will directs that land be sold, but appoints no person to sell it; this power impliedly devolves upon the executor, provided he is charged with distribution of the proceeds, more especially if interested therein.(4)

(1) Lessee, &c. v. Smith, 3 Binn. 69.
(2) 4 Kent, 325; 2 N. Y. Rev. St. 109; 1, 735; Brown v. Armistead, 6 Rand. 594; Robertson v. Gaines, 2 Humph. 367.

(3) Co. Lit. 112 b; Hearle v. Greenbank, 3 Atk. 714; Eyre v. Countess, &c., 2 P. Wms. 102; Muldrow v. Fox, 2 Dana, 79.

(4) Blatch v. Wilder, 1 Atk. 420; Davoue v. Fanning, 2 John. Cha. 254; White v. Taylor, 1 Yeates. 422; Jenkins v. Stouffer, 3, 163; Sug. 160-5; Bogert v. Hertell, 4 Hill, 492; Meakings v. Cromwell, 2 Sandf. 512; Dorland v. Dorland, 2 Barb. 63.

would carry with them a power to the executors to sell real estate, yet where, without a sale, a just and equal division of the estate would be difficult or impracticable, in order to effect such a division, a general power of sale given to the executors may very properly be exercised. *Ib.*

Such a power, when there is no other purpose for its exercise, will subsist, however, not as an independent power, but solely as connected with, and in subordination to, the power to divide; and the two will form an entire and indivisible authority, which, from its nature, can only vest in, and be exercised by the same person or persons. *Ib.*

A power to make a partition of lands has no connection with the office or duties of an executor; nor is its nature altered in any respect by the addition of a power of sale, which is to be used only as a mode or instrument of division. Although a power thus to sell and divide may be given to executors, yet in its execution they act not at all as executors, but wholly as devisees in trust. *Ib.*

The power to sell, in such cases, being simply discretionary and its execution or non-execution vesting entirely in the judgment of those who are to make the partition, it has not the effect of converting the lands into personality. *Ib.*

And where the proceeds of lands, when sold, are to be distributed among those to whom the lands themselves are devised, it is as devisees and owners that they receive them, and their respective shares cannot be denominated legacies. *Ib.*

Where a power to sell lands is given to executors *ratione officii*, and only by their official name, it has been doubted whether its exercise must not be limited to those who prove the will; but where it is given to executors by their individual names, or to executors "hereinafter named," it vests in all those who are thus named, whether they prove the will or not, by force of the will itself; and a devise of the power is then construed to take effect in precisely the same manner as a devise of the legal estate. *Ib.*

A power which an executor takes by force of the will, and not of its probate, is not divested nor affected by his renunciation of the office. *Ib.*

When a power to sell lands, whether coupled with an estate, or a naked power, is given to several persons as executors, it may be executed, under the Revised Statutes, by those who take upon themselves the execution of the will, without the concurrence of those who neglect or refuse. *Ib.*

But the provision of the statute has never been construed as divesting the estate or power of an executor who has neglected or refused to qualify; nor is it applicable at all, when the only surviving executor is one who has thus neglected or refused. That is a case for which the statute has omitted to provide, and which the rule of the common law must still continue to govern. *Ib.*

32. But in South Carolina this doctrine is denied, and application to Chancery is required to authorize a sale. And in New York, by the Revised Statutes, the Court of Chancery is invested with the execution of all powers created by will, for the execution of which no person is appointed by the testator.(1)

33. In Mississippi, where land is devised to be sold, sale is made by the executors, or those who undertake execution of the will, if no other person is appointed, or he declines, or dies before completion of the trust. If none of the executors qualify, or if they die before a conveyance, it may be made by the administrator *cum testa. annex.*(2)

34. A power to sell cannot be executed by attorney, when personal trust and confidence are implied.(3)

35. But a power coupled with an interest, given to one *and his assigns*, may be assigned.(4)

36. In New York, by the Revised Statutes, all beneficial powers pass to assignees, in case of insolvency.(5)

37. If a power be limited to such uses as *A shall appoint*, this is said to give a fee, and the donee may limit to such uses as *B may appoint.*(6)

38. If an appointment is made to *A* to the use of *B*, this is a use upon a use, and *B* takes only a trust.(7)

39. When a power is executed, the appointee is regarded by the law as holding under the original instrument which created the power, and not under the latter one which executes it. The execution or appointment revokes or annuls all intervening estates and uses, as effectually as if the execution had been effected by the first instrument. Hence the validity of the power is determined by a reference to the original instrument. If it would have been for any cause ineffectual under this, it is void in law.(8)

40. In New York, by the Revised Statutes, the period, for which the right of alienation may be suspended, is calculated not from the execution but from the creation of the power. By the same statutes, a power in trust, given to tenants for life, to devise the ultimate fee to any of their descendants, who may not be in existence at the death of such tenants, or to appoint any estates but absolute fees, except in case of death during minority, is void.(9)

41. With regard to the form in which a power shall be executed, if none is prescribed, it may be done by any sort of instrument; a deed, a will, or even an unsealed writing; for the execution is not the creation of an estate, (which already exists,) but merely the declaration of a use. But, on the other hand, where a form is prescribed, the law requires that it be very strictly adhered to. Thus, in a very leading case upon this subject, where a power to lease was created, provided every lease should contain a power for re-entry for non-payment of rent; it was very long and strenuously argued, whether a lease, providing that

(1) Drayton v. Drayton, 2 Desaus. 250, n.; 1 N. Y. Rev. St. 734. See Ferebee v. Proctor, 2 Dev. & B. 439; Conklin v. Egerton, 21 Wend. 430; Peebles v. Watts, 9 Dana, 102.

(2) Missi. Rev. C. 62.

(3) Combes' case, 9 Co. 75 b; Ingram v. Ingram, 2 Atk. 88; Cole v. Wade, 16 Ves. 27.

(4) How v. Whitfield, 1 Vent. 338.

(5) 1 N. Y. Rev. St. 735.

(6) Combes' case, 9 Co. 75 b.

(7) Sug. 170, 181-2.

(8) 1 N. Y. R. St. 737; Badham v. Mee, 1 My. & K. 32; Fearne on Exec. Dev. (Powell's n.) 347-88; Johnson v. Yates, 9 Dana, 497.

(9) 1 N. Y. Rev. St. 737; Ib. 723; Hawley v. James.

if the rent should be unpaid for fifteen days, and no sufficient distress, &c., the lessor might re-enter, was a valid execution. The question, after conflicting adjudications, was finally settled in the affirmative; the re-entry provided for being held a reasonable one.(1)(a)

42. In regard to the technical expressions required by the law for the creation of certain interests; an instrument made in execution of a power does not materially differ from the conveyance of an estate.(2)

43. In New York, by the Revised Statutes, every instrument made in execution of a power, even though it be a power of revocation merely, must be such as would be requisite to pass the estate itself. If a *conveyance* is required, it must be authenticated and registered like other deeds; if a will, it must be executed with all the formalities of a devise, and, if any additional or superfluous forms are created, they need not be complied with.(b) If the instrument prescribed is one insufficient to pass the land, the power is not thereby rendered void, but it shall be executed conformably to the rules already mentioned. Conditions merely nominal, and involving no beneficial intention to the appointee, may be disregarded in the execution; but in all other respects, the intention of the grantor, in regard to manner, time and conditions of execution, shall be complied with—reserving a power to the Court of Chancery to aid any defective execution. If a grant is prescribed, though to take effect after the grantor's death, a will is insufficient. Where the consent of a third person is required to the execution, such consent shall be expressed in or certified upon the instrument itself, by the signature of the party to the instrument or certificate, which shall be proved or acknowledged.(3)

44. In the same State, by a late act, sales by executors under a power in a will—except in the city of New York, and in the absence of any contrary direction—may be public or private, and on terms at the discretion of the executors. In the city of New York, such sales shall be by auction, upon six weeks' notice, as in case of sales by order of the surrogate. But, it seems, this provision does not control any express directions in the will to the contrary.(4)

45. A power cannot, in general, be legally executed before the time appointed for its execution. But, in New York, by the Revised Statutes, such premature execution of a power of revocation is good, to take effect from the time appointed.(5)

(1) *Hawkins v. Kemp*, 3 E. 410; *Doe v. Peach*, 2 M. & S. 576; *Wright v. Barlow*, 3, 512; *Wright v. Wakeford*, 17 Ves. 454; *Sug. 205-6-20-29-30-52-62*; *Doe v. Smith*, 1 Brod. & B. 97; 2, 473; *Darlington v. Pulteney*, Cowp. 260. See *Doe v. Burdett*, 6 Nev. & M. 259; *Buller v. Burt*, Ib. 281; *Silverthorn v. McKinster*, 12 Penn. 67.

(2) *Tapner v. Merlott*, Willes, 177.

(3) 1 N. Y. Rev. St. 735, 736, 737; *Jackson v. Edwards*, 7 Paige, 385.

(4) N. Y. L. 1835, May 9, ch. 264; 4 Kent, 332, n.

(5) Co. Lit. 113 a; *Cox v. Day*, 13 E. 118; 2 N. Y. Rev. St. 134.

(a) Where there is a mere power to sell lands, a power to mortgage will not be implied. *Albany, &c. v. Bay*, 4 Comst. 9. Whether a trustee appointed by will, with power to sell and dispose of lands in fee-simple, or otherwise, may mortgage the lands, *quære*? Ib.

(b) So, in regard to wills, in England, by a late statute, 1 Vict. ch. 26. See, as to attestation of wills, *Doe v. Burdett*, 9 Ad. & Ell. 936. See, also, *Wood v. Richardson*, 4 Beav. 174; *Pratt v. Church*, Ib. 177. A power was to be executed by a writing with two witnesses, or a will with three. A will was made with only two. Held, bad. *Bainbridge v. Smith*, 8 Sim. 86. In North Carolina, where a power is executed by will, it must be executed with the legal formalities of a devise. And this will be sufficient, though something more is expressly required. St. 1844-5, 128. See *Vincent v. The Bishop, &c.*, 3 Eng. L. & Equ. 198.

46. A power need not be fully executed by one act; but may be exercised at successive times over different parts of the estate. Thus even a mortgage does not exhaust a power of revocation; but is only an execution *pro tanto*. So the *cestui que trust* in a deed of trust, with power to change the uses, may change the use of a part of the estate only, and not of the whole. Thus, a change of the uses, by way of mortgage, is a revocation of the former uses only *pro tanto*, and not a complete execution of the power.(1)

47. A power may be executed without reciting or even referring to it, provided it appears that the subject of the power was in the view of the party. This is the general rule. But, in case of wills, the subject or the power itself must be referred to; or else a clear intent to execute it must appear from the fact, that such execution is necessary to give operation to the will. And, in regard to both deeds and wills, where a party has both an interest and a power, and does an act without referring to the latter; such act shall apply to the former only, upon the maxim *factio cedit veritati*.(2)

48. In New York, by the Revised Statutes, where the interest created by a party is such as he would have no capacity to convey but by virtue of the power; the conveyance shall be deemed an execution, though the power be not mentioned or referred to. And a devise of all the testator's real estate shall pass lands which he has the right of devising under a power, unless they are expressly or by necessary implication excluded. In the same State it had been previously held, that *trust estates* will pass under a general devise of real estates.(3)

49. One who executes a power may reserve in the instrument a right to revoke the uses thereby declared, and appoint new ones, even though no such reservation is authorized by the original creation of the power. If the instrument of execution is a will, like other devises it is *ambulatory* and revocable till the death of the testator, without any express reservation of a power. But where the execution is by deed, it is absolute and irrevocable, unless an express power is reserved, even though the original instrument expressly authorize successive executions. And it is said that a mere power of revocation, in a deed *executing* the power, will not authorize a limitation of new uses.(4) It has been suggested by high authority, that, upon principle, the power of revocation provided in the original deed ought to extend to all subsequent executions, without the necessity of a repetition of it in the instruments of execution. A power to revoke uses and appoint new ones may be executed by a single instrument, unless there be an express provision to the contrary.(5)

(1) Digge's case, 1 Co. 173; Snape v. Turton, Cro. Car. 472; Bovey v. Smith, 1 Vern. 84; Perkins v. Walker, 1 Vern. 97; Asay v. Hoover, 5 Barr, 21.

(2) Jones v. Wood, 4 Harr. 25; Cox v. Chamberlain, 4 Ves. 631; Roach v. Wadham, 6 E. 289; Caswell, 1 Atk. 559; 2 N. Y. Rev. St. 134; Hunloke v. Gell, 1 Rus. & My. 515; Sloane v. Cadogan, Sug. 282; Bennet v. Aburrow, 8 Ves. 609; Bradish v. Gibbs, 3 John. Cha. 551; Walker v. Mackie, 4 Russ. 76; Lovell v. Knight, 3 Sim. 275; Lempriere v. Valpy, 5 Sim. 108; Davies v. Williams,

3 Nev. & Man. 821; Doe v. Roake, 2 Bing. 497; The King v. Company, &c., 6 Barn. & Cr. 720; Roake v. Denn, 1 Dow, (N. S.) 437; Clero's case, 6 Co. 17 b; Parker v. Kett, 12 Mod. 469; Colt v. Bishop, &c., Hob. 159-60; 2 Ves. 59; 3, 467; 7, 391.

(3) 1 N. Y. Rev. St. 735-6-7; Jackson v. De Lancey, 13 John. 537.

(4) Sug. 321; Ward v. Lenthal, 1 Sid. 343; Hatcher v. Curtis, 2 Free. 61; Hele v. Bond, Prec. in Cha. 474.

(5) 4 Kent, 336; Hoover v. Samaritan, &c., 4 Whart. 445.

50. In New York, by the Revised Statutes, the execution of a beneficial power or power in trust cannot be revoked, unless such revocation is authorized by the original instrument creating the power. A grantor may reserve to himself any power, beneficial, or in trust, which he might confer upon another. If he reserve an absolute power of revocation, it shall have the effect of continuing the ownership of the estate in him, with respect to creditors and purchasers.(1)(a)

51. It has already been stated, in general, that a party to whom an estate is limited by the execution of a power takes, not under the instrument of execution, but under the original instrument by which the power was created. Another form of stating the same principle is, that the execution of a power *has relation* to its creation.(2)

52. Conveyance to a trustee in fee, to such uses as A should by deed appoint; in default of appointment, to A in fee, with a reservation of a fee-farm rent to the trustee, and a covenant by A to pay it. A conveyed the land by lease and release to B, in the same deed directing and appointing the estate and use to the purchasers. Held, A took a vested fee, subject to be divested by the execution of the power; and also that B took the estate under the appointment, and not under the conveyance; and consequently, holding under the original grantor and not under A, he was not liable to the rent, though the covenant ran with the land.(3)(b)

53. So it has been held, that where a will empowers executors to sell the lands, and before such sale the heir of the testator enters, and conveys to a third person, who dies seized; the estate of the latter is still divested by a subsequent sale by the executors, the purchaser from them being deemed to hold under the will itself.(4)

54. The modern doctrine is, however, that the execution of a power cannot, *by relation*, impair intervening rights and interests, acquired by third persons, for valuable consideration, without notice of the power.(5)

55. The interest of an appointee under a power is an estate liable for his debts; and cannot be limited in such way as to protect it from the claims of creditors.(6)

56. Where one has a general power of appointment, which he actually exercises by deed or will, equity regards the property as assets belonging to him, and his creditors have a paramount claim to that of the appointee. But equity will not interfere in behalf of creditors, unless the party has actually executed or shown some intention to execute the power. Thus, if he has a power of appointment in favor of his children, and makes such appointment, the land shall be appropriated for creditors, instead of going to the children. But if he should make

(1) 1 N. Y. Rev. St. 733-5.

(2) Lit. 169; Co. Lit. 113 a; 2 Atk. 562-7; Bradish v. Gibbs, 3 John. Cha. 550; Doolittle v. Lewis, 7, 45; Thomson v. Livingston, 4 Sandf. 539.

(3) Roach v. Wadham, 6 E. 289.

(4) Jenk. Cent. 184, pl. 75; Bro. Abr. Devise, pl. 36; Willard v. Nason, 5 Mass. 242.

(5) 4 Kent, 338-9; Jackson v. Davenport, 20 John. 537-50-53.

(6) Alexander v. Alexander, 2 Ves. 640.

(a) A power of appointment fails by the bankruptcy of the party to whom it was given. *Hole v. Escoff, 2 Keen, 444.*

(b) Deed to such uses as the grantee shall appoint. Judgments were afterwards recovered against him, and subsequently he made an appointment. Held, the appointees should hold, though they had notice of the judgments. *Skeels v. Shear, 3 My. & C. 112.*

no appointment, equity would not interfere. In other words, equity will aid the *defective execution* of a power, but will refuse to interfere where there is no execution.(a) The distinction has been considered as an unreasonable one, but it seems to be now well established. The principle is, that though the party has power to vest an interest in himself by his own act, yet, until he does such act, so far as he could claim under the power, he stands in the situation of a third person, whose interest is not to be affected by claims against the donee of the power. But when the power is actually executed, though in a way which does not provide for creditors, an interest vests in the appointer, which is subject to their claims. The Court of Equity only assumes to direct the application of the fund raised by virtue of the power, and hold it to be assets for the payment of debts; or, in other words, to *change the direction* of an appointment actually made, without itself making such appointment.(1)

57. Where the power is special instead of general, or a power of appointing to certain designated persons, and not, therefore, for the benefit of the donee himself, the exercise of it will not have the effect of subjecting the estate to the claims of creditors.(2)

58. In a late case it is held, that equity relieves only against a defect which relates to the *manner* of execution; as, for instance, the want of a seal. But it will reform a deed, which by mistake fails to express the intention of the parties.(3)

59. In New York, every special and beneficial power is made liable in equity to creditors, like other interests which *legal* process does not reach; and equity may compel an execution for their benefit. It may do the same in the case of a *trust power*, or one created for the benefit of other persons than the grantee, unless its execution is left expressly at his discretion. But the mere right of *selection* constitutes no exception. If there are several beneficiaries, they take equally, unless the contrary is expressed. But if the distribution is left to the trustees, they may allot to one or more at pleasure. If, in the latter case, the trustee dies, without execution, or if an execution is defective, equity will execute in favor of all the parties equally. Equity may also decree entire or partial execution of a trust power in favor of the creditors or assignees, (if the interest was assignable,) of any person entitled, as an object of the trust, to compel execution. Purchasers for consideration, claiming under a defective execution, may have the same relief as other purchasers. Fraud affects instruments made in execution of a power, in the same way as others. A power is a lien upon the lands subjected to it, as against creditors of and *bona fide* purchasers from any one interested in the lands, from registration; as against others, from execution.(4)

(1) *Lassells v. Cornwallis*, 2 Vern. 465; *Prec. in Cha.* 232; *Hinton v. Toye*, 1 Atk. 465; *Bainton v. Ward*, 2, 172; *Ld. Townsend v. Windham*, 2 Ves. 9; *Pack v. Bathurst*, 3 Atk. 269; *Troughton v. Troughton*, Ib. 656; 1 Story on Equ. (3d ed.) 111; *Schenck v. Ellingwood*, 3 Edw. 175; *Lucena v. Lucena*, 5 Beav. 249.

(2) *Holmes v. Coghill*, 7 Ves. 506; *Holmes v. Coghill*, 12, 206.

(3) *Cockerell v. Cholmelly*, 1 Russ. & My. 418.

(4) 1 N. Y. Rev. St. 734-5-7. See *Dominick v. Sayre*, 3 Sandf. 555; — *v. Michael*, 4, 374.

(a) Chancery cannot relieve against the defective execution of a power created by law. *Bright v. Boyd*, 1 Story Rep. 478.

60. At common law, where a power was given to appoint to and among several persons, each might claim some share; and, in equity, a *real and substantial* one. If the appointment is to be to *such of the children as the trustee may think proper*, one may have the whole. If *amongst* the children, as he shall think proper, each must have a share. By Statute 1 Wm. IV, c. 46, no appointment can be impeached in equity, as unsubstantial, illusory or nominal.(1)(a)

61. The donee of a power may appoint in fee, though no words of inheritance are used. So under a power to *charge* lands, they may be charged to any amount, or even disposed of in trust to sell and divide among the objects. So a power to *grant* or *appoint* authorizes a *charge*; to *sell* and *raise money*, a *mortgage*. And a less estate may be appointed than the one designated. In all these cases, the intention is the rule of construction.(2)

62. A power to appoint to *relations* extends to all who might take under the statute of distributions. But if *grandchildren* only are named, *children* cannot take. In general, it seems, where a *class* is mentioned, it includes only those living at the time of appointment.(3)(b)

63. Where the donee of a power *appendant* makes a lease, this cannot be impaired by a subsequent execution of the power. So the donee of a *collateral* power cannot suspend or extinguish it by his own act. But a total alienation of the estate extinguishes a power *appendant* or in *gross*. Thus, if tenant for life, with power to lease in possession, alienate his life estate, the power is gone. Whether such alienation would extinguish a collateral power, has been questioned. Even a mortgage of the whole estate has been thought to extinguish a power *appendant* or *appurtenant*. But this principle is doubted, except to the extent of giving effect to the mortgage, and it has received this express qualification in New York. In New York, the power of a tenant for life to lease cannot be *separately* assigned, but passes with the estate, unless excepted, in which case it is extinguished. All powers, except those collateral or in gross, may be extinguished by release to the tenant of the freehold.(4)

(1) *Kemp v. Kemp*, 5 Ves. 557; *Astry v. Astry*, Prec. in Cha. 256; *Thomas v. Thomas*, 2 Vern. 513.

(2) *Liefe v. Saltingstone*, 1 Mod. 189; *The King v. Stafford*, 7 ff. 521; *Waneham v. Brown*, 2 Vern. 153; 2 Abr. Eq. 668; *Whitlock's case*, 8 Co. 69 b.

(3) Sug. on Pow. 514-5; *Alexander v.*

Alexander, 2 Ves. 642; *Brudenell v. Elwes*, 1 B. 442; *Needham v. Smith*, 4 Russ. 318.

(4) *Ren v. Bulkeley*, Doug. 292; *Goodright v. Cator*, Ib. 477; Co. Lit. 237 a, 265 b; *Digge's case*, 1 Co. 175 a; 1 Atk. 474; Sug. 57; 1 N. Y. Rev. St. 733; Sug. 62-4; *Badham v. Mee*, 7 Bing. 695.

(a) Under a power of appointment to *children*, *grandchildren* cannot be the appointees. *Hewitt v. Dacre*, 2 Keen, 622.

(b) Generally, *children* does not include grandchildren. But in a will, it may include even great-grandchildren, if the intention so require. 4 Kent, 345, n.; *Cutter v. Doughty*, 23 Wend. 522; *Hallowell v. Phipps*, 2 Whart. 376; *Mowatt v. Carrow*, 7 Paige, 328; *Phillips v. Beall*, 9 Dana, 1.

CHAPTER C.

LIABILITY OF REAL PROPERTY FOR DEBTS.(a)

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| <ul style="list-style-type: none"> 1. English doctrine. 2. General rule in the United States. 3. Judgment, whether a lien on lands. 8. <i>Attachment</i> in New England. | <ul style="list-style-type: none"> 9. Liability of lands to execution; rules in the several States. 24. Liability of the lands of one deceased for debts. 43. Taxes. |
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1. AT common law, estates in fee-simple are not liable for any debts of the owner, except debts of record, and by specialty. An exception having been made in favor of the king, Magna Charta (s. 10) provided, that no land or rent should be seized by the king or his bailiff for debt, while there were chattels on the premises.(1)(b)

2. In the United States, it is the general, if not universal policy of the law, to make the whole of a man's property liable for the payment of all his debts, both during his life, and after his death. It is said, that for this purpose lands are considered as chattels. But, in the spirit of Magna Charta, personal property must in general be first taken upon legal process;(c) and it is the universal rule, that this is the primary fund for payment of debts, where the debtor has died.(2)

3. In New York, Pennsylvania, and Indiana, a judgment constitutes a lien on the debtor's real estate.(d) In New York, the lien applies to a decree in Chancery, embraces after-acquired land, and continues ten years. In Pennsylvania, it commences with the signing of judgment, and continues five years from the first return day of that term, unless revived by *scire facias*, or by agreement of the parties and terre-tenants, writen and filed. It does not include lands purchased after judgment, and sold before execution.(e) In Indiana, the lien may be extended to land in other counties, by recording the judgment there. It continues ten years from January 1, 1826, if judgment was rendered before that time; if after, ten years from rendition of judgment, unless revived by *scire facias*. But if judgment were stayed by order of court, or by an

(1) 1 Cruise, 48.

(2) Whitney v. Whitney, 14 Mass. 88; Brown v. Webb, 1 Watts, 414; Pur. Dig. 293, 297; Andrew v. Fleming, 2 Dall. 94; Den v. Hunt, 6 Halst. 1; Daniels v. Ellison, 3 N. H. 279; Co. Lit. 223; Gore v. Brazier, 3 Mass. 523; Wilson v. Watson, 1 Pet. Cir. 269; 2 N. Y. Rev. St. 367; Ohio St. 1831, 101; Conn. St. 1821, 36, 56.

(a) The subject of this chapter is concisely treated, because it most naturally falls under the head of *remedies* relating to real property; an extensive title, not included in the plan of the present work.

(b) The United States are, in cases of insolvency, entitled to priority over other creditors. But this privilege gives them no prior lien upon real estate from the time of contracting the debt, though it seems they have a lien from the time of insolvency. (Forsyth v. Clark, 3 Wend. 637; Walk. 175.) See U. S. v. Duncan, 12 Illin. 523. In Indiana, the State has a lien upon the property of its debtor from the *teste* of process. (Ind. Rev. L. 243.) In Illinois, the law gives a lien on lands of *convicts*. (Illin. Rev. L. 214.)

(c) It is held, however, that an execution purchaser is not bound to show that the debtor had no chattels. This is a question between the debtor and the officer. Frakes v. Brown. 2 Blackf. 295; acc. Isham v. Downer, 8 Conn. 282; Spencer v. Champion, 13, 11.

(d) A judgment in the U. S. Court has the same effect. 1 Kent, 248, 342. See Shrew v. Jones, 2 McL. 78; N. Y. Code, ch. 2, sec 88.

(e) Such lien becomes extinguished, by the creditor's acquiring title to the land. Koons v. Hartman, 7 Watts, 20; Brobst v. Bright, 8 Watts, 124. See Penns. St. 1843, 127.

agreement recorded, the time during which it was so suspended shall not be reckoned in the ten years.(1)

4. In North Carolina, it has been held, that a judgment is a lien, if an *elegit*,(a) (see *Elegit*,) is taken out, but not where there is a sale upon *fi. fa.* But this doctrine has been somewhat shaken, and the *elegit* is said to be now obsolete in that State.(2)

5. A judgment is also a lien in New Jersey,(b) Virginia,(c) Maryland, Ohio,(c) Tennessee, Missouri,(d) Illinois, Mississippi,(e) South Carolina,(f) Georgia,(g) Delaware and Alabama. But, in New Jersey, a junior judgment gains priority by prior delivery of the execution to an officer. In Maryland, the lien of a judgment is subject to the specific lien given by a prior contract. In Ohio, the lien is confined to the county, and continues only a year, unless execution is levied, as against any other judgment. It does not embrace after-purchased lands. By a statute of 1831, judgments standing five years without execution lose their lien. In Tennessee, the lien continues twelve months, and binds all the lands so acquired by the debtor as to be subject to sale by him, during that period. A judgment creates a lien upon equitable estates, in Chancery. In the same State, an agreement by the creditor to delay execution forfeits his lien. In Virginia, only a moiety of the debtor's lands is bound by a judgment.(3)(h)

(1) 2 N. Y. Rev. St. 182-3; Ind. Rev. L. 274; Purd. 293-4, 420-1-2; Rundle v. Ettwein, 2 Yea. 23; Norton v. Talmadge, 3 Edw. 310; Crosier v. Acer, 7 Paige, 137; Custer v. Detterer, 3 Watts & S. 28; Whitehead v. Parrell, 2 Miles, 434; Muier v. Leitch, 7 Barb. 341; Dunn v. Olney, 2 Harr. (Pen.) 219; Lombard v. Baryard, Wallace jr., 196; Young v. Renier, 4 Barb. 442; Averill v. Loucks, 6 Barb. 19; Orth v. Jennings, 8 Blackf. 420; Michaels v. Boyd, 1 Smith, 100; Simpson v. Niles, Ib. 104; Cooper v. Cutshall, Ib. 128; Rockhill v. Hanna, 4 McL. 555; Lounsbury v. Purdy, 11 Barb. 490; Haverly v. Becker, 4 Comst. 169; Clark v. Dakin, 2 Barb. Ch. 36; Buchan v. Sumner, Ib. 165; Scott v. Howard, 3 Barb. 319; Wilkes v. Harper, 1 Comst. 586; Bratton, 8 Barr, 164; Hays, Ib. 182;

Hart, Ib. 185; Parmentier v. Gillespie, 9 Barr, 86; Moorehead v. McKinney, Ib. 265.

(2) Jones v. Emmonds, 2 Mur. 43.

(3) Reeves v. Johnson, 7 Halst. 29; Bank, &c. v. Longworth, 1 McL. 36; Riddle v. Bryan, 5 Ohio, 55; McCormick v. Alexander, 2 Ohio, 65; Ib. 3, 135; Roads v. Symmes, 1, 313; Stiles v. Murphy, 4, 92; Porter v. Cocke, 1 Peck, 30. See Ib. App. 1; Murfree v. Carmack, 4 Yerg. 270; Anthon's Shepard, Virginia; Coombs v. Jordan, 3 Bland, 328; Moale v. Buchanan, 11 Gill & J. 314; Bustard v. Morrison, 1 Scam. 236; Greenway v. Cannon, 3 Humph. 177; Parrish v. Saunders, Ib. 431; Abbott v. Malone, Ib. 532; Chapron v. Casseday, Ib. 661; Clements v. Berry, 11 How. 398; Wolfe v. Gardner, 4 Harring. 338.

(a) By St. 1 & 2 Vict. ch. 110, sec. 11, the whole, instead of one-half, as formerly, of a debtor's lands, may be taken on execution. 1 Steph. 288.

(b) Such lien is implied, although there is no statute on the subject. Burton v. Smith, 13 Pet. 464. See Rodgers v. McCluer, 4 Gratt. 81. In Maryland, the judgment of a magistrate's court gives no lien. Md L. 1296. See Doub v. Barnes, 4 Gill, 1.

(c) In Ohio, leasehold estates in the lands and water power situated on the canals and rivers, and owned and leased by the State, are not subject to judgment liens. Buckingham v. Reeve, 19 Ohio, 399.

(d) The lien of a judgment will hold against a prior unrecorded deed without notice. Frothingham v. Stacker, 11 Mis. 77.

(e) Where a judgment is made a lien on all the debtor's property, for two years from the passage of the statute creating the lien; the lien must be consummated by a sale within that time, and will not be extended by the subsequent levy of an execution sale under it. Beirne v. Mower, 13 S. & M. 427.

(f) In South Carolina, it is said, that at common law lands were not liable to be taken on execution; but by St. 5 Geo. II, they became liable for all debts, as in England for those by specialty; including the whole estate of the debtor. Drayton v. Marshall, Rice, 374.

(g) Seven years' peaceable possession of land since 1822, by a *bona fide* purchaser, without actual notice of a judgment against the vendor, will protect the purchaser against the lien of a judgment obtained prior to the act of 1822. Griffin v. McKenzie, 7 Geo. 163.

(h) In Iowa, a judgment is no lien upon a pre-emption right. It attaches only to the estate in fee, or by inheritance. Harrington v. Sharp, 1 Iowa, 131.

6. In Kentucky and Mississippi, the lien commences upon delivery of an execution (to an officer.) In Tennessee, from the *teste* of the execution.(1)

7. In Pennsylvania, by act of March 20, 1799, a *testatum* execution is a lien from delivery to the officer; but, by a later act, (April 1, 1823,) it is to be recorded in the court records, and gives a lien from such entry for five years.(2)

8. In New England, a judgment constitutes no lien; but, as a substitute therefor, lands may be *attached* on the writ, or on *mesne process*.(a) An attachment is recorded, and then takes precedence of all subsequent incumbrances, though *perfected* only by the levy of an execution. The effect of the execution *relates* to the attachment.

9. In New England,(b) where land is levied upon by execution, it is *appraised*, and then delivered to the creditor at its value, and the execution and appraisal returned to the clerk's office, and recorded in the registry of deeds. In Massachusetts, Maine and New Hampshire, the debtor may redeem within one year. In Vermont, within six months, paying 12 per cent. interest. In Rhode Island and Connecticut, there is no redemption.(3)(c)

(1) 4 Kent, 435. (See *Bell v. King*, 8 Por. 147; *Morris v. Ellis*, 3 Alab. (N. S.) 560; *Campbell v. Spence*, 4, 543; *Pickens v. Marlow*, 2 Sm. & M. 428; *Planters, &c. v. Calvit*, 3, 143; *Zecharie v. Bowers*, Ib. 641; *U. S. Bank v. Tyler*, 4 Pet. 366; *Million v. Riley*, 1 Dana, 360; *Roney v. Bell*, 9, 3; *Taylor v. Mumford*, 3 Humph. 67; *Jobe v. O'Brien*, 2 Humph. 34; *Hood v. Winsett*, 1 B. Monr. 209; *Reid v. House*, 2, 581; *Massingill v. Downs*, 7 How. U. S. 760.

(2) *Purd.* 293-5.

(3) 5 Dane, 22-5; 1 Swift, 154-5; *Booth v. Booth*, 7 Conn. 350; *Phelps v. Parks*, 4 Verm. 488. See *Picket v. Breckenridge*, 22

Pick. 297; *Verm. Rev. St.* 241-3; *Spencer v. Champion*, 13 Conn. 11; *Mass. St.* 1829, 123; *Boothby v. Commercial, &c.*, 30 Maine, 361; *Chandler v. Sawtell*, 22 Verm. 318; *Boyd v. Page*, 30 Maine, 460; *Bradley v. Bassett*, 2 Cush. 417; *Leonard v. Bryant*, Ib. 32; *Robertson v. Demoss*, 23 Miss. 298; *Morgan v. Mason*, 20 Ohio, 401; *Hayden v. Stewart*, 1 Md. Ch. 459; *Ellicott v. U. S., &c.*, 7 Gill, 307; *Bailey v. Mizell*, 4 Geo. 123; *Kollock v. Jackson*, 5, 153; *Litchton v. McDougald*, Ib. 176; *Branch, &c. v. Curry*, 13 Ala. 304; — *v. Ford*, Ib. 431; *Planters, &c. v. Conger*, 12 S. & M. 527; *Rupert v. Dantzler*, Ib. 697.

A judgment will not operate as a lien upon after-acquired estate, until a levy. *Harrington v. Sharp*, 1 Iowa, 131; *Woods v. Mains*, 1 Iowa, 275.

Under the laws of Wisconsin and Iowa, previously to the statute of frauds of 1840, judgments did not operate as liens upon real estate. *Woods v. Mains*, 1 Iowa, 275.

The 6th section of "An act to prevent frauds," in Iowa, extended to all valid judgments previously rendered in the supreme and district courts, and gave to every such judgment, *in esse* at the date of its approval, as effectual a lien upon the real estate of the judgment debtor as subsequent judgments could; and this section also extends to operative judgments rendered within the limits of Iowa, under the territorial governments of Michigan and Wisconsin. [HASTINGS, C. J., dissenting.] Ib.

(a) See *Me. L.* 1834, 195; 1835, 247. In Rhode Island and Connecticut, only for want of chattels or of the body. Where an officer, serving an execution, made demand of money and chattels to satisfy, and no personal property was offered to him; held, he might lawfully levy upon land, though the debtor at that time owned and possessed personal property sufficient to satisfy the execution. *Graves v. Merwin*, 19 Conn. 96. In Alabama, after return of *non est inventus* upon the writ. *Clay*, 54, 60. See *Mass. St.* 1838, 123. In Illinois, if a writ of attachment or execution is issued from one county to another, and levied on land, the levy is recorded in the county where the land lies. So, where an attachment is levied on land, in any case. *St.* 1841, 181. As to attachment in North Carolina, see *Harlin v. Carson*, 4 Dev. & B. 388.

(b) Except Rhode Island, where it is sold.

(c) See *Verm. L.* 1837, 4. In Massachusetts and New Hampshire, *equities of redemption* are sold. In Maine, the lands of a manufacturing corporation may be sold, and be redeemed, or subject to legal process, like lands mortgaged. *Me. L.* 1838, 484-5. In New Hampshire, (*Rev. St.* 396.) if the levy of an execution is stayed by injunction, thirty days are allowed after dissolution thereof. Where the property is not conveniently divisible, an undivided

10. In Pennsylvania, where land is to be taken upon execution, there is a previous inquest of twelve men as to the value, unless the debtor waive it in writing. And where, before the extent is out, other judgments are recovered against the same defendant, and the whole amounts due cannot be paid, from the profits, the land shall be sold. Where no sale can be made, the land is delivered to the creditor in satisfaction by appraisement. Not less than one whole tract or lot shall be sold. An estate for life may be sold, without inquisition. So any estate of uncertain duration. So woodland, or land wholly unimproved or vacant. So any other land, where it is evidently insufficient to satisfy the judgments from the profits.(1)(a) Where lands are levied on, if the jury find that seven years' rents will be insufficient to satisfy the execution, there shall be an appraisal. If the defendant assent to a condemnation, according to the act of 1836, and if an inquisition and condemnation are not deemed necessary, there shall be a valuation. Unless two-thirds of the amount is bid, there shall be no sale for one year. There shall be an appraisal in all cases, though the estate be only for life or for years. But execution shall not be stayed, unless the interest is paid on the debt, and on prior liens, and the ground-rent and municipal charges, subject to the judgment; and, semi-annually, interest on judgments and ground-rents. After inquisition as to the yearly value upon execution, the plaintiff may allow the debtor or any party in interest to retain the land, giving notice accordingly. If this is not done, the land is sold. Rent shall be paid every six months; if behind for 30 days, a sale takes place. The court apportions the rent among the respective parties having title. If a life estate in improved lands is levied on, a *sequestrator* is appointed to receive the rents, and he either sells or leases.

11. In Delaware, the lands are appraised; and, if the inquest finds that the rents and profits for seven years will pay the debt, the lands are extended, and possession given to the creditor, as upon an *elegit*; if not, they are sold without right of redemption.(b) In Ohio, lands shall

(1) Purd. Dig. 289-90-4-5-7; Howell v. Binn. 91; Smull v. Mickleby, 1 Rawle, 96; Woolfort, 2 Dall. 75-7; Roe v. Humphreys, Penns. St. 1843, 235-407-9; 1841, 2-4; 1 Yeates, 427; Grant v. Eddy, 2, 150; Duncan v. Robeson, 454; Burd v. Dansdale, 2 1842, 407-9; Crawford v. Boyer, 2 Harr. 380.

interest may be set off, or such division made as the appraisers think best. A levy may also be made upon the rent or income of the property, for a certain period, and the tenant must attorn or be ejected. Ib. 394. An execution title will be valid, if recorded on or before the return-day; otherwise, only against the debtor, until recorded. Ib. See Barker v. Wendell, 12 N. H. 119; McConike v. Sawyer, Ib. 397.

(a) Under a *venditioni exponas*, the sheriff must sell the debtor's whole interest without reservation or restriction. Fretz v. Heller, 2 Watts & S. 397. The parties may, by consent, waive the inquisition, and have the lands sold without it. Overton v. Tozer, 7 Watts, 331.

Where a party suffered his land to be sold upon an execution issued on a judgment more than five years old, and not revived by *sci. fa.*; held, neither he nor those claiming under him could afterwards, in a collateral proceeding, call in question the validity of the sale. Hinds v. Scott, 1 Jones, 19.

(b) On a sale of real estate by the sheriff, he must be prepared to show at least one advertisement, posted in each hundred, 10 days before the sale, and it seems, that this is not exclusive of both the day of posting and the day of the sale. Underwood v. Jeans, 4 Harring. 201.

The sheriff is bound to prove notice of sales of land strictly. Burton v. Wolfe, 4 Harring. 221.

Objections to the inquisition on land were heard after the return term, where the defendant had no notice or knowledge of the holding of the same until after the term. Ib.

not be sold under the amount of two-thirds of the appraised value, (except in sales for taxes, or against officers for money collected.) If two-thirds of the appraised value will satisfy the execution, the judgment is no longer a lien on the residue, as against *bona fide* judgment creditors.(a)

12. In North Carolina, lands are liable to be taken on legal process, for debts, for want of chattels. Like the latter, they may be sold upon execution. But, a creditor may, at his election, have one-half of the debtor's real estate delivered to him, upon a reasonable extent or price. (See sec. 4.)

13. In New Jersey, Maryland, South Carolina, and Georgia, it seems, lands are sold on execution, without right of redemption. In the last named State, where the debtor is the head of a family, upon all contracts subsequent to the passage of the act, (1843,) except those for the price of the land itself; fifty acres are exempted from attachment and execution. A debtor is authorized to point out the property which he wishes to have taken.(1)

14. In New York, land is sold on execution at law, or in Chancery, for want of goods, on six weeks' notice, and in separate parcels, if required. A certificate is delivered to the purchaser,(b) and another filed in the clerk's office of the county within ten days. The debtor or his representative may redeem within one year, for 10 per cent. interest. A joint tenant, &c., upon paying his rateable share. If the debtor does not redeem, a creditor, by judgment or decree in equity, may do it, within a year and three months, upon paying 7 per cent. interest. Any other judgment creditor may redeem from him, upon payment of what he has paid, with interest, and the amount of his claim, if it is a prior lien upon the land. So with other successive creditors. But such redemptions must be within fifteen months from the sale. At the end of that time, the officer gives a deed to the purchaser, and he acquires an absolute title. The deed *relates* to the time of sale, and has precedence of intervening incumbrances.(2)

(1) 1 N. C. Rev. St. 265. See *Borden v. Smith*, 3 Dev. & B. 34; *Higgins v. Ketchum*, 4, 414; *Ga. St.* 1843, 121, 2; 1842, 85; 4 Kent, 431. (See *Den v. Downam*, 1 Green, 135;) *Ga. St.* 1743, 121, 122; *Carson v. Smart*, 12 Ired. 369.

(2) 1 N. Y. Rev. St. 183, 363; 367, 8, 9, 370, 4. See *Emmet v. Bradstreet*, 20 Wend. 50; *Wood*, 4 Hill, 542; *Paddock*, Ib. 544; *Newell*, Ib. 589, 608; *Baker*, Ib. 613; *Pennell v. Hinman*, 7 Barb. 644; *Wright v. Douglass*, 10 Barb. 97.

It seems, that the sheriff is not bound to inquire on lands which have been sold and conveyed by the defendant, and possession delivered, though such lands are bound by the judgment, at least until after condemnation of the other lands also bound. Ib.

Notice of holding inquisitions on land, or of sale, should be served personally on the defendant, if residing in the county; otherwise on the tenant, or at the mansion-house or other notorious place on the premises. *Wolf v. Heathers*, 4 Harring. 325.

A sale of land on execution was set aside for want of notice of inquisition. *Collins v. Steel*, 4 Harring. 536.

(a) Though a sale be made without appraisement, the purchaser still takes a good title. *Lessce, &c. v. Parish*, 3 Ohio, 187.

(b) It is held, that one receiving such certificate dies *seized*, though he has never taken a deed. *English v. Helmerth*, 3 Comst. 294.

But, on the other hand, it has been decided, that such purchaser acquires no more than a lien upon the land for the amount of his bid and interest, during the 16 months allowed for redemption, whether the premises are subject to a mortgage or not. *Vaughn v. Ely*, 4 Barb. 159.

A sheriff's deed of lands sold under judgment and execution, executed after the time of redemption from such sale has expired, *relates* to the time of sale; and where, before such deed

15. In Virginia,^(a) Kentucky, Delaware and Alabama,^(b) the English form of *elegit* is retained, whereby the creditor extends his execution upon a *moiety* of the debtor's lands. But in Alabama, he may also sell upon execution. In Alabama, after sale on execution, there is a right of redemption for two years, on payment of 10 per cent. interest. Other creditors may redeem. If a creditor tenders the amount, and offers or agrees to credit the debtor with 10 per cent. on the purchase-money, the purchaser is bound to convey to him, unless the purchaser within six months pay the creditor the amount of this advance. If the purchaser, or one claiming under him, is a creditor, he may, at his election credit the debtor. Other creditors may redeem from the first on the same terms. In Virginia, only the Commonwealth can sell land on execution.⁽¹⁾

16. In Tennessee, Illinois, New Jersey and Kentucky, land is first appraised. In Tennessee, if it cannot be sold for three-quarters of its appraised value, the creditor may take it at that rate—otherwise, he loses his lien. In New Jersey, the debtor has six weeks to redeem. In Kentucky, the debtor may redeem within twelve months, unless the land brings two-thirds of the appraisement. Lands sold under a Chancery decree need not be appraised.⁽²⁾

17. In Tennessee, a sale is void, unless the sheriff give to the debtor, if in possession, twenty days' written notice of the time and place of sale, or other equivalent information. By act of 1820, the debtor or other creditors may redeem within two years, paying ten per cent. interest.⁽³⁾

18. In Indiana, a debtor's whole estate is subject to execution; but he has the right to direct what portion shall be taken, and, if he give no direction, the land, &c., on which he is *chiefly situated*, shall not be seized, if there is any other to be found.^(c) The personal property is first to be sold, unless the debtor elect otherwise. Before selling the fee-simple of land, the sheriff shall offer for sale the rents thereof for seven years, and if such term will bring enough to satisfy the execution, it shall be conveyed. A sale of the fee, without such previous offer, is void.^{(4)(d)}

(1) 4 Kent, 431, n., 434; Clay, 207, 502, 503; Goodlet v. Smithson, 5 Por. 245; For-
v. Proctor, 9 B. Mon. 24.

(2) Ten. St. 1823, 14; Illin. Rev. L. 370;
4 Kent, 429 n., 433. Blakey v. Abert, 1 Dana,
185.

(3) Trott v. M'Gavock, 1 Yerg. 5, 215; 4
Kent, 434. See Rothwell v. Gettys, 1 Humph.
135, Killibrew v. Elliott, 11, 442.

(4) Ind. Rev. L. 234, 5; Gautly v. Ewing,
3 How. 707.

is given, another person, by an attachment, judgment, and sale, acquires all the interest of the purchaser, and procures the sheriff to execute and deliver a deed, in which such original purchaser is named as grantee, the title passes thereby, although such grantee does not consent to the execution and delivery thereof. Wright v. Douglass, 2 Comst. 373.

(a) The officer does not give *actual*, but only *legal* possession, on which the creditor must bring ejectment. Roland v. Barkley, 1 Brock. 356.

(b) Forty acres, not exceeding in value, \$400, which value is to be appraised, are exempted from execution, for the benefit of permanent families. The provision, however, does not apply to lands in any town or city. Clay's Dig. 210.

(c) By ancient statutes in Pennsylvania, land of this description could not be sold within a year from judgment. (Purd. 288, 91.) But these acts are obsolete and not practised under. 2 Yeates, 456.

(d) By a late statute, land sold on execution may be redeemed within twelve months, or by subsequent incumbrancers thirty days beyond this period, at twelve per cent. interest. No sale shall be made for less than one-half the cash value according to an appraisement,

19. In Illinois, the purchaser of land on execution at first receives from the officer only a certificate. The debtor, his representatives or grantees, may redeem in twelve months, and any other judgment creditor in fifteen months—paying 10 per cent., interest. If there is no redemption, the officer gives a deed. Neither personal estate, nor the land on which the debtor resides, can be taken, where there is other property. In the same State, the judgment is a lien on lands for seven years, if execution be issued in one year. If execution have been staid by order of the court, this time is not reckoned as part of the seven years. The lien is not destroyed by the defendant's or plaintiff's death. The act applies to certificates of purchase from the United States, if held by record. A decree in Chancery gives a lien, as well as a judgment at law. By a late act, the creditor, after the expiration of a year, must sue out execution, deliver it to the officer, and redeem from the first sale by paying the necessary sum to the officer. The officer then makes a certificate of redemption, files it in the recorder's office, and advertises and exposes the land for sale. The sum paid by the creditor is considered as a bid, and if there is no higher one, he receives a deed of the land, irredeemable. If there is a higher bid, and the land struck off to such bidder, the excess is applied to the execution, under which the redemption was made, and the purchaser receives a certificate for a deed in 60 days. In case of redemption from this sale, the officer proceeds in the same way so long as any judgment creditor will redeem. After the lapse of 60 days without redemption, a deed is given. Certificates are made assignable.

By another act, no property shall be sold on execution, till after an

and the execution may be renewed every three months, in case of failure to sell upon the first one. This provision does not apply to certain honorary or confidential debts. St. 1841, 130, 1. Sales of land made on execution, in violation of the appraisement law, are void, though the purchaser had no actual notice of such violation. *Holman v. Collins*, 1 Smith, 58.

In Indiana, an appraisement law, in existence at the inception of a contract made in that State, enters into and becomes a part of the contract; but, in the case of a contract made in another State, the appraisement law does not attach and become a part of it, until judgment is recovered thereon in Indiana: and the law in force at the time of the recovery of judgment controls the sale on execution. *Ib.*

If, after a sheriff has levied an execution on a tract of land, the execution debtor lay off the land into town lots, the sheriff will not be bound, on the mere request of such debtor, to sell the lots separately. *Kiser v. Ruddick*, 8 Blackf. 382.

In Ohio, the lands shall not be sold for less than two-thirds of the appraisement, except in sales for taxes, or against officers for money collected. They are to be appraised by three freeholders, and if the execution does not exceed two-thirds of the value, the lien of the judgment ceases, as against other judgment creditors. 4 Kent, 433. See *Baird v. Kirtland*, 8 Ohio 22.

In Michigan, real estate is appraised, before it can be sold on execution. If, at two-thirds the appraisement, it exceeds the amount of the execution, the appraisers set off enough to equal the latter, which, if accepted, satisfies the execution; otherwise, it is sold by the sheriff, if it will bring two-thirds of the appraisal. If not, the lien remains till a sale. Certain special claims are exempted from these privileges. Mich. St. 1841, 45, 7, 150, 3; 1842, 135, 8; 1843, 155, 60. The property may be again offered for sale, but not more than twice in a year. The lien continues a year from the levy. Redemption is allowed within one year, in case of mortgage, six months, at ten per cent. interest. The deed of the sheriff is left with the register.

Separate lots are separately appraised and sold. If a division would be injurious, an undivided share is sold. So, the interest of a tenant in common, &c. The above provisions, as to appraisal, &c., do not apply to mortgages which expressly stipulate that they shall not.

In Arkansas, lands taken on execution are appraised if the debtor so requires, and shall not be sold for less than two-thirds of the appraisal. They remain in the debtor's hands, and after one year are sold absolutely. Ark. St. 1840, 58.

appraisal at its *cash* value, or for less than two-thirds of such appraisal. But the process may be repeated at the pleasure of the creditor. The plaintiff may elect on what property to levy, except the land on which the debtor resides, and personal property, which shall be last seized. The act applies to all sales of mortgaged property, whether foreclosed at law or in Chancery, and only to judgments prior, and to be rendered on any contract or cause of action prior to May 1, 1841.(a)

20. In Missouri, the debtor may elect on what property the execution shall be levied. Where land on a lease for more than three years is taken, the officer gives a deed for seven years. Execution may be levied on "all real estate owned at the rendition of judgment," &c., or at any times afterwards; but not on property to which the lien of the judgment does not extend or *has been determined*, (unless owned at the time of the officer's receiving the execution.) Judgments are a lien upon lands for three years. An execution is no lien, till delivered to an officer.(1)

21. In Mississippi, if the lands do not bring, or the creditor will not take them at, two-thirds of the appraisement, a peremptory sale may be prevented by giving security. Sales under Chancery decrees are on six months' credit. If, in an execution sale, the property does not bring two-thirds of the value, after twelve months a new process issues, and it is sold absolutely. Where a debtor is the head of a family, the law exempts from execution on contract 160 acres, not the site of a city, town or village. If he owns over one quarter section, the exemption shall include the house and improvements. If there are several tracts, he may make a selection. If in a city, &c., to the value of \$1,500, exclusive of buildings. If he owns more, there shall be a division, if practicable; otherwise, he may pay the excess; or there may be a sale in common. In case of more than one lot, he may select. Where a levy is delayed by injunction, the lien continues.(2)

22. In case of *sale* on execution, the sheriff gives a formal deed. Otherwise, where the land is *extended* upon, in which case the creditor acquires a *record* title, and no deed is necessary.(3)

23. Whether *rights of entry* may be sold on execution, seems a point somewhat unsettled. The prevailing doctrine is, that they may. So held, expressly, in Tennessee. In Massachusetts, *the real estate*, subject to execution, includes lands fraudulently sold, and rights of entry.(4)(b)

(1) Illin. Rev. L. 370-1-2-4, 125; St. 1841, 168; 1842-3, 186; Misso. St. 256, 339; St. 1838, 44. See *Landes v Brant*, 10 How. 348; *Hammond v. Scott*, 12 Mis. 8.
(2) 4 Kent, 433; Missi. L. 511, 846; *McGebe v. Handley*, 5 How. 625; St. 1841, 113-15-16-17.

(3) See *Den v. Abingdon*, Dougl. 473.
(4) *Jackson v. Varick*, 7 Cow. 238; *Inglis v. Trustees, &c.*, 3 Pet. 131. (But see *Ib.* 177;) *Bumpass v. Gregory*, 8 Yerg. 46; Mass. Rev. St.

(a) This and similar *stop-laws* (so called) of other States have been adjudged invalid, as conflicting with the constitution, by the Supreme Court of the United States. *Bronson v. Kenzie*, 1 How. 311. The Statute of Illinois had been previously held valid by the court of that State. *Williams v. Waldo*, 3 Scam. 265.

(b) In Virginia, slaves, though personal estate, shall not be sold till the rest of it is exhausted, and only for payment of debts and expenses. *Anth. Shep.* 494. In Maryland, it is held, that whatever may be *sold*, may also be taken on execution. *Coombs v. Jordan*, 3 Bland, 299. In New Hampshire, an *attachment* of real estate gives a lien upon the debtor's right of redeeming from execution or tax sales, and his right of receiving conveyances under contracts. N. H. Rev. St. 368. The creditor has a right to discharge any incumbrance, and either he or the officer may demand a statement of its amount. Unless furnished in fifteen

24. Where a person has died, his personal property shall be first applied in payment of debts, even though expressly bequeathed, and though the real estate is expressly charged with such payment, unless the personal estate is in terms exonerated. In Massachusetts, (and probably this is the general rule,) the property shall be arranged in reference to debts, as follows: 1. Personal estate, excepting specific bequests, or such of it as is expressly exempted; 2. Real estate appropriated by will to the payment of debts; 3. Descended estate; 4. Lands specifically devised, although they may be generally charged with debts, if not specially appropriated. (a) Lands specifically devised are not liable

days, or, if untrue, the incumbrance is discharged. After payment, if the attachment is in any way defeated, the creditor may claim a conveyance from the incumbrancer of his title, and, if not made, may recover back the sum paid. If such conveyance is made, the debtor is notified, and may still redeem. Any change in the title of a debtor to lands attached, has no effect upon the attachment, but his whole interest is bound thereby. *Ib.* 369. The right to receive a conveyance of land may be sold on execution, and the vendee may maintain a bill in equity to enforce performance. So, the right of redeeming any real estate. *Ib.* 396. In Maine, it seems, all interests in real estate are subject to execution. *Rev. St. (passim.)* Thus, a mere possessory title. *Ib.* 388. So in Vermont. The right of redemption continues for six months, during which the creditor cannot enter; but the debtor must account for the rents, &c. Where the estate cannot well be divided, an undivided portion is set off. An equity of redemption, or an undivided portion thereof, may be set off. An execution may be levied on rents, the tenant making attornment, and the creditor shall hold till paid, subject to redemption as in case of lands. If lands, &c., levied on do not belong to the debtor, a *scire facias* may issue upon the execution. In case of doubt as to the formal validity of a levy, either party may, by petition, obtain a decision of the court thereupon. If vacated, the levy continues a lien sixty days from the rising of the court. The officer, when so directed, leaves a copy of the execution with the register of deeds. The lien continues five months. *Verm. Rev. St.* 240-5.

(a) A *residuary* devise is not *specific*. *Bradford v. Haynes*, 2 *Appl.* 105. If a devise is made to the *heir*, the debts are charged *pari passu* upon the land devised to him, and that devised to others. *Reiderman v. Seymour*, 3 *Beav.* 368. The heirs of one deceased hold his lands subject to debts, having a mere right of possession till these are paid, and no power to transfer them to the prejudice of creditors. *Watkins v. Holman*, 16 *Pet.* 25. The legislature may make lands primarily liable for debts, to the exclusion of personal property. *Ib.*

If devised real estate is sold for payment of debts, and assets are subsequently discovered and received by the executors; the devisees may claim reimbursement. *Couch v. Delaplaine*, 2 *Comst.* 397.

A devisee of land charged with debts is not liable to an action at law by the creditors, unless he has expressly promised to pay. *Elwood v. Deifendorf*, 5 *Barb.* 398. And even if he has entered and promised to pay the debts, he is not personally liable, at law, unless the land is exclusively charged. *Ib.* A devisee, by accepting the devise, becomes personally liable, but the land is not thereby exempted. *Ib.* The lien exists even against grantees of the land. But the devisee is liable to pay the debts in exoneration of the lands, and the remedy against him must be exhausted before proceeding against the land. *Ib.*

The rule established in England, that residuary devisees are to be regarded as specific, on the ground that a testator can only dispose of the lands owned by him at the time of making his will, if it ever was in force here, was abrogated by the *Rev. Sts.* c. 62, sec. 3, by which testators are enabled to dispose by will of subsequently acquired real estate. *Blaney v. Blaney*, 1 *Cush.* 107.

Where a testator gave several money legacies and specific bequests, and one or two specific devisees, and gave all the residue of his estate, real and personal, after the payment of his debts and the expenses of fulfilling his will, to four cousins, naming them; held, the lands devised in the residuary clause were not chargeable, in aid of the personal estate, with the payment of the legacies, but, the personal estate being insufficient to pay the legacies, they must abate. [Seven judges concurring, four judges dissenting.] *Olden v. White*, 1 *Haist.* Ch. 629.

Where a testator, by the residuary clause of his will, gives all the rest and residue of his estate and effects, real and personal, not therein otherwise effectually disposed of, after payment of his debts, legacies, funeral expenses, and other charges therein authorized, to his

to be sold for payment of specific legacies; and even a judgment debt shall be paid from the latter, not the former.(1)

25. Personal property, specifically bequeathed to the widow of the testator, shall be applied to payment of debts before land devised.(2)

26. Where there is a specific lien upon lands,—as where they are mortgaged for debts, or the lands are devised on condition of paying debts, or with a direction to that effect;—the general rule shall not apply, but the lands shall be first appropriated. So, if there is an evident intention that legacies be paid entire, and the debts from some other source, a court of chancery will carry it into effect.(3)

27. Personal property, not effectually bequeathed, is the primary fund for payment of debts, even though the will directs payment from the rents and profits of the real estate; unless the will clearly shows, that the testator meant to leave some of his personal property undisposed of and exempted from debts, for the benefit of his next of kin or residuary legatee. And if the residuary legacy become lapsed, this will restore the personal estate to its primary liability.(4)

28. Real estate is in general liable for debts, in the hands of devisees or *bona fide* purchasers from the heirs. In Massachusetts, New Hamp-

(1) *Burton v. Knowlton*, 3 Ves. 107; *Schermerhorn v. Barhydt*, 9 Paige, 29; *Chase v. Lockerman*, 11 Gill & J. 185; *Brummell v. Prothers*, 3 Ves. 111; *Rogers v. Rogers*, 3 Wend. 503; 4 Kent, 420, n.; *Hays v. Jackson*, 6 Mass. 149; *Mass. Rev. St.* 420; *Hubbell v. Hubbell*, 9 Pick. 561; *Humes v. Wood*, 8, 478; *Hayes v. Seaver*, 7 Greenl. 237; *Rogers v. Rogers*, 1 Paige, 188; *Swan*, 999–1000; *Watkins v. Holman*, 16 Pet. 25; *Hammond v. Hammond*, 1 Bland, 359; *Chamberlain v. Brown*, 1b. 221; *Boucher v. Bradford*, 1b. 222; *Kilty v. Brown*, 1b. 223; *Hindman v. Clayton*, 1b. 337; *Tyson v. Hollingsworth*, 1b. 329; *Welch v. Stewart*, 37; *State v. Brookes*, 42; *Foster v. Craig*, 2 Dev. & B. 209; *Litsey v. Smith*, 10 B. Mon. 74; *Kelsey v.*

Western, 2 Comst. 500; *Stuart v. Kissam*, 11 Barb. 271; *Paterson v. Scott*, 9 Eng. L. & Eq. 261; *Whieldon v. Spode*, 10, 130; *Picard v. Mitchell*, 7, 252; *Graham v. Little*, 5 Ired. Eq. 407; *Cornish v. Willson*, 6 Gill, 299; *Jones v. Hughes*, 3 Eng. L. & Eq. 554; *Marsh v. Marsh*, 10 B. Mon. 360; *Bailey v. Boutt*, 8 Eng. L. & Eq. 51; 9, 195; *Kirkpatrick v. Rogers*, 7 Ired. Eq. 44; *Buchanan v. Pue*, 6 Gill, 112.

(2) *Rogers v. Rogers*, 3 Wend. 503.

(3) *Rogers v. Rogers*, 1 Paige, 188. See *Parsons v. Bowne*, 7 Paige, 354.

(4) *Hawley v. James*, 5 Paige, 318; *Stevens v. Gregg*, 10 Gill & J. 143; *Lee, &c.*, 18 Pick. 285.

daughter; this creates a charge upon the *residuum*, in case there is a deficiency of personal property. *Buckley v. Buckley*, 11 Barb. 43.

Where a testator directs that all his just debts and funeral expenses shall be paid by his executors, the charge is confined to property given to the executors. And if there is a devise of land to them, such land is chargeable with debts, unless otherwise specifically and entirely appropriated by the will. *Ib.*

Where the law separates real and personal estate, which a testator had given to the same persons, subject to charges, (as in case of estate given to aliens,) and then gives one portion of the property to one set of persons, and the other portion to another set, it must in like manner apportion the charges, so that the fund and the incumbrance shall go together. *Atkins v. Kron*, 5 Ired. Eq. 207.

Where a testator devised his real estate, subject to the payment of his debts, in case the personal estate should be insufficient; after the date of his will purchased other real estate, paying a part of the purchase-money in cash, and afterwards gave his bonds, for moneys borrowed to discharge a mortgage for the balance, some of which bonds existed as debts at his death; and the land so subsequently purchased descended to his heirs; held, the descended land was chargeable with the debts before the land devised. *Stires v. Stires*, 1 Halst. Ch. 224.

Lands charged with debts, and alienated by the devisee, must be subjected to the debts in the inverse order of alienation. *Elwood v. Deifendorf*, 5 Barb. 398.

shire,^(a) Vermont, Maine, Pennsylvania,^(b) Mississippi, South Carolina, Georgia, Ohio, it may be taken upon an execution against the executor &c.⁽¹⁾ In Ohio, the judgment specifies that it is to be satisfied out of assets in their hands. In Maryland,^(c) lands are subject to a process in

(1) *Martin v. Latta*, 4 McCord, 123; *Gore v. Brazer*, 3 Mass. 523; *Hutchinson v. Stiles*, 3 N. H. 404; *Graff v. Smith*, 1 Dall. 481; *Nokes v. Smith*, 1 Yeates, 238; *Fritz v. Evans*, 13 S. & R. 14; *Walk*, 254; 3 Grif. 444; 4, 669; *Drayton v. Marshall*, Rice, 374.

See *Keckelely v. Moore*, 2 Strobb. Eq. 21; *Worthy v. Hames*, 8 Geo. 234. As to the law of Kentucky, see *Nelson v. George*, 1 B. Monr. 282; *Buford v. McKee*, 3, 228.

(2) *Anth. Shep.* 265, 497.

(a) The clauses of the New Hampshire Statute of July 2, 1822, providing that the estate of every person being testate or intestate shall stand chargeable with the payment of his debts, asserts a general principle, which is to be made effectual by the force of other provisions of the law providing the mode of enforcing the remedy. *Ticknor v. Harris*, 14 N. H. 272.

When the ancestor bound himself and his heirs in an obligation under seal, the obligee might sue the heir or executor, and have execution of the land descended to the heir. But if the heir aliened before action brought, or the ancestor devised the land, the creditor was without remedy against the heir and devisee. *Ib.*

To remedy this, the Statute of 4 Wm. & Mary, c. 14, gave a remedy in an action of debt to creditors by bond or other specialty, against the heir and devisee jointly. *Ib.*

This remedy is extended to all creditors here, by the third section of the colonial act of Geo. II, for the more easy recovery of debts of his Majesty's plantations in America, which makes houses, lands, negroes, and other hereditaments chargeable with all just debts, in like manner as real estates are by the laws of England liable to the satisfaction of debts due by specialty. *Ib.*

This statute, made for the colonies, having been used and practised on, was adopted by our constitution, and may be considered part of our common law. *Ib.*

By the operation of this statute, and by a proviso in the seventh section of the act of July 2, 1822, for the settlement of insolvent estates, any creditor of an estate administered in the insolvent course, whose demand depended on a contingency, so that it could not be allowed by the commissioners, has a remedy against the heir and devisee. *Ib.*

The statute, by saving the remedy against heirs and devisees, makes the real estate chargeable in their hands, but it goes no farther. *Ib.*

Where the heir-at-law takes nothing by descent, he should not be joined in the action against the devisee. The statute, which authorizes the bringing of an action against heirs and devisees jointly, intends, by heirs, those who have actually inherited. *Ib.*

Whether a creditor, whose claim depends upon a contingency, may have a remedy in Chancery, so as to reach the personal estate in any case, *quære?* *Ib.*

(b) Where lands devised are liable to contribute to the payment of debts ratably with specific legacies, and the executor uses the fund of the legatees to meet the whole deficiency of assets for the payment of debts, it is such mismanagement as that the Orphans' Court may require him to give security. *Cryder's Appeal*, 11 Penn. State R. 72.

In Pennsylvania, under the acts of April 4, 1797, and February 24, 1834: 1. A judgment, against the personal representative alone of a decedent, extends the operation of the creditor's lien on the decedent's land over an additional period of five years, commencing after the expiration of the first period of five years allowed him, not after the rendition of the judgment, although it be rendered before such first period expires. 2. The subsequent action of debt against the personal representative and heirs, professedly based upon such judgment, may be properly regarded as a distinct and independent action, competent, if brought within five years from the death of the decedent, to prolong the lien *proprio vigore*. 3. The heirs of the decedent, who are made parties to such second action, are bound to set up every available defence, and, in case of judgment for want of a plea, they will be estopped in subsequent proceedings from setting up any defence they might then have made. 4. The non-joinder of an heir in such action can be objected to only by plea in abatement therein. 5. And one heir, defendant, cannot object that a co-defendant, a minor, was personally summoned. *Schwartz's Estate*, 14 Penn. State R. 42.

(c) In this State, where land of the deceased is subject to mortgage, a devisee of such land may require payment thereof from the personal estate, unless this is required for other debts; but not from the real estate devised to other persons. *Gibson v. McCormick*, 10 Gill & J. 65. If the heir pays a bond debt, he is entitled to repayment from the personal estate. *Tessier v. Wyse*, 3 Bland, 41. The heir is liable at law, even though the personal property be sufficient. *Ib.* *Coombs v. Jordan*, *Ib.* 302. See *Post v. Mackall*, *Ib.* 520. The implied lien upon real estate is excluded by the express security of a bond from the heir.

Chancery. In New Jersey⁽²⁾ the real estate cannot be thus taken. So in Virginia.^(a) But in New Jersey, the creditor may have a new process against the executor, &c., to compel a sale, if execution is returned unsatisfied; and in Virginia, the heir is liable, to the amount of the land conveyed. In Tennessee,⁽¹⁾ land cannot be taken, till the personal estate is exhausted. In Delaware,⁽²⁾ the claim of the creditor must first have been submitted to arbitrators. In North Carolina,⁽³⁾ an act of 1784^a gave a *fi. fa.* against the lands in the hands of an heir or devisee, upon a judgment against the executor, &c., in certain cases; but it prescribed a *scire facias* against the former.^(b) In

(1) Ten. St. 1827, 60; *Boyd v. Armstrong*, 1 Yerg. 40.

(2) Anth. Shep. 347-8.

(3) 1 Bad. & Dev. Eq. 515. See *Barrow v.*

Arrenton, 1 Ired. 223; *Foster v. Sumner*, 3 Sm. & M. 606; *Raiford v. Peden*, 10 Ired. 466.

(4) 4 Griff. 939.

And this is, to be enforced at law, not in Chancery. *Ib.* But a creditor, by taking a bond from the heir, does not lose his legal priority of claim against the estate. *Hindman v. Clayton*, 2 Bland, 342; *Cox v. Callahan*, 2, 52. See *Austin v. Cochran*, 3 Ib. 339; *McCormick v. Gibson*, 501; *Cape Sable, &c.*, *Ib.* 640. Where the parties assent to an indiscriminate sale of the real and personal property, judgment creditors have the same lien, as if the whole were real. *Cape Sable, &c.*, *Ib.* 660. See *Smith v. The State*, 5 Gill, 45.

(a) A testator devised all his estate, real and personal, to his children, to be equally divided between them after paying his debts. After the personal property had been exhausted in paying debts, a creditor filed a bill against the executor alone to subject the land of the testator to his debt. Commissioners were appointed by the court to sell and convey the land for this purpose, which they did, and their report was confirmed. Held, that the devisees were not bound by the decrees, and that such sale passed no title to the purchaser. *Hudgin v. Hudgin*, 6 Gratt. 320.

Held, also, that the debts of the testator being a charge upon the land, the purchaser was entitled to be substituted to the rights of the creditor whose debt he had paid; and to charge the land to that extent. *Ib.*

Held, also, that the creditor, not having entered into any covenants, and not being guilty of fraud, was not liable to the purchaser, executor, or devisees. *Ib.*

(b) In North Carolina, where the personal estate of a deceased debtor has been exhausted, and his lands have also been sold, creditors, whose debts remain unsatisfied, have a right, in equity, to have satisfaction decreed out of the rents and profits derived from the land by the heirs; at least of so much as remain in their hands unexpended. *Washington v. Sasser*, 6 Ired. Eq. 336.

In New Jersey, a decree against executors, in a suit against them, is no evidence, in a subsequent suit against devisees, of the existence of the debt. *Hazen v. Tilman*, 1 Halst. Ch. 363.

In New York, heirs may be made liable for the debts of their ancestor, but not unless it appears that the personal assets were not sufficient to pay the same, or that after due proceedings before the surrogate at law, the creditor has been unable to collect such debt from the executor, or next of kin, or legatees. Thus, a suit at law against the prior parties is an essential preliminary to a right to sue the heirs. The heirs are to be sued jointly in equity. *Stuart v. Kissam*, 11 Barb. 271.

The creditor in all cases is required to seek satisfaction from the personal property, before he resorts to the real estate in the hands of the heir. *Ib.*

In a suit of this kind, whether at law or in equity, all the heirs must be joined, and the heirs and personal representatives cannot be joined in a suit. *Ib.*

Before a creditor can maintain a suit against heirs to charge them with the debt of their ancestor, he must establish these facts: 1. The granting of letters testamentary or of administration. 2. That three years have elapsed, after the granting of such letters and before the commencement of the suit. 3. That the defendant has inherited lands by descent from the debtor. 4. The want of sufficient personal assets, or the inability of the plaintiff to collect his debt, or some part thereof, after due proceedings before the proper surrogate and at law. *Roe v. Swezey*, 10 Barb. 247.

The law, which forbids the commencement of a suit against an heir to charge him with the debts of his ancestor, until three years have elapsed since the granting of letters of administration upon the estate of the ancestor, forbids a suit for any purpose whatever, and such creditor cannot, on suit, have the judgment of the court, as to whether the defendants took the estate as heirs, or purchasers under a deed of trust. *Ib.*

iciency of personal property, may be taken for debts by a suit against heirs or devisees, after three years from probate of the will or granting of administration. All must be joined in suit, and, if practicable, they shall be charged proportionally. The right of obtaining contribution is also given. If the heirs or devisees have aliened, they are personally liable. Attaching creditors have priority in the order of their attachments. The above provisions are not to interfere with the settlement of estates by executors and administrators.(1)(a)

29. An administrator, in general, cannot sell real estate for any other purpose, than the payment of debts due from the intestate at his death. (Otherwise in Pennsylvania—*infra*, sec. 33.)(2)

30. An administrator has no lien upon the real estate, for a debt due the intestate from one of his heirs.(3)

31. An execution against an executor *de son tort*, cannot be levied on real estate of the testator.(4)

32. In Ohio, where an administrator has sold lands for payment of debts, the heirs are no longer liable to a *scire facias* on account of such lands.(5)

33. In Pennsylvania, creditors retain a lien upon the land of one deceased only seven years, unless for debts due by mortgage, judgment or record. But if the debt is not payable in seven years, a statement of it duly filed will preserve the lien. If the creditor is under disability, he retains the lien four years from its removal. A sale of land by order of court discharges all liens but mortgages. In the same State, an ad-

(1) L. of R. I. 236.

(2) Dean v. Dean, 3 Mass. 258.

(3) Hancock v. Hubbard, S. J. C. Mar. 1837; 19 Pick. 167.

(4) Mitchel v. Lunt, 4 Mass. 654.

(5) Miami, &c. v. Holly. Wright, 226. See Sprague v. Litherberry, 4 McLean, 451.

In a suit under 2 Rev. Sts. 452, against heirs, on account of real estate descended to them, it seems, that the heirs and personal representatives of the deceased cannot be joined. *Mersereau v. Ryerss*, 3 Comst. 261.

But all the heirs must be joined, and they will not be liable for the debt, unless it shall appear that the personal assets of the deceased were insufficient to pay it, or that, after due proceedings before the surrogate and at law, the creditor was unable to collect it, or some part of it, from the personal representatives. *Ib.*

And where the creditor does not show that the personal estate is insufficient, and there have been no proceedings, either before the surrogate or at law, he cannot hold the heir liable for the debt, on the ground that the residence of the administrator in another State was an excuse for omitting to institute such proceedings. *Ib.*

And where, under the statute, the creditor was not entitled, upon his pleadings and proofs, to recover in an action brought against the heir, it was held, that the reference of the cause to a master to take the account, and for other purposes, did not operate as a waiver of the right to make this objection. *Ib.*

(a) It is the general rule, where the executor, &c., is primarily liable, that the heir, &c., becomes so after a certain time from the testator's death. In New York, where judgment was rendered by default against a part of the heirs or devisees, before the Revised Statutes, but was not satisfied; it did not extinguish the whole claim against others, but only an equitable and proportional share. If the creditor by delay lost his lien, the other heirs, &c., were liable only *pro rata*. By the Revised Statutes, heirs, &c., who have not alienated, are not personally chargeable, nor liable for contribution; but the judgment orders satisfaction from the estate. And the devisees are not liable, unless the heirs are insufficient. No action can be brought against heirs or devisees, till after three years from grant of administration. *Schermerhorn v. Berhoydt*, 9 Paige, 28; *Leonard v. Morris*, *Ib.* 90. A suit against heirs must be joint. *St.* 1837, 537.

ministrator may mortgage or sell lands for payment of debts, or the support or education of children.(1)(a)

34. In North Carolina and Tennessee, if a creditor is appointed administrator, and the personal property is insufficient to pay his debt, he may have a process against the heir, to obtain payment from the land.(2) In North Carolina, where an executor, being sued, pleads *plene admin.* or a *want of assets*, the heirs or devisees may come in and contest such plea.(3) If the plea is sustained, the plaintiff may summon in the heirs or devisees, and have execution against the lands. The same may be done, where the executor, &c., is insolvent, unless the creditor has been guilty of negligence or collusion. The creditor may still, at his election, have his remedy in equity.(4) Where there are no heirs or devisees, he may have judgment against *the university* after notice. The heir of a *cestui que use*, if a special occupant, is liable as in other cases.(5) A conveyance of the land by the heir or devisee, within two years from probate or administration granted, is void. A conveyance after that time is valid, but the grantor is personally liable to creditors.(6)

35. In Virginia, the devisee of a messuage, &c., is made liable to an action of covenant, or any other action, which would lie against the heir upon the deed of the testator, in the same manner as to an action of debt upon the testator's obligation.(7)

36. In Tennessee, when the personal estate is exhausted, the administrator, or any creditor, for himself and others, may file a bill to subject the real estate to payment of debts. The proceeds are rateably distributed among all creditors; and equity in the meantime enjoins all but judgment creditors from proceeding at law.(8)

37. In Ohio, creditors retain a lien upon the real estate of heirs or devisees, five years. And they are afterwards personally liable to the extent of their assets.(9)

38. In Indiana, where an execution against an executor, &c., is returned unsatisfied for want of chattels, the creditor may petition the court, who will issue notice to the executor, and the heirs or devisees, and may then order execution against the real estate in their hands. An heir, having assets by descent, is not personally bound, though defaulted in the suit; but after the purchase of a writ the land is bound, as at common law, where the heir pleads a true plea.(10)

39. In Missouri, the court may order the real estate to be sold, on petition of the executor, &c., or any one interested, and the personal

(1) Purd. 421; Ib. 300-1, 406, 415; Kerper v. Hoch, 1 Watts, 9; Anth. Shep. 306; Clauser, 1 W. & Serg. 215; Bailey v. Bowman, 6, 118.

(2) 1 N. C. Rev. St. 364; 4 Griff. 790.

(3) 1 N. C. Rev. St. 279.

(4) Ib. 362.

(5) Ib. 366.

(6) Ib. 367.

(7) Va. L. 1835-6; Ch. 63.

(8) Dalley v. Read, 6 Yerg. 53. See Thompson v. Brown, 4 John. Cha. 619; Morrice v. Governor, &c., Cas. Temp. Tal. 218; Clarke v. Orm6nde, Jac. 108.

(9) Walk. 254. See Haynes v. Colvin, 19 Ohio, 392.

(10) Ind. Rev. L. 244, 276. See Thompson v. Hare, 8 Blackf. 336; Skerry v. Denn, Ib. 542; Collins v. Farnsworth, Ib. 575.

(a) The same limitation of the right of lien applies to an administrator who pays debts of the deceased, as to the creditors themselves. McCurdy, 5 Watts & S. 897. So, also, where the deceased made a conveyance to defraud his creditors. Sherman v. Farmers', &c., Ib. 373. See McClure v. McClure, 11 Penn. 477; Mans v. Hammel, 11 Pen. 228.

reserved. In such case there is an appraisement, and the executor, &c., shall not purchase at public sale, nor shall the land be sold at private sale for less than three-fourths of the appraisement. No deed is given, till after approval of the executor's report. If he is the purchaser, the deed is executed by the clerk of the court. The deed passes an absolute title. Where, after settlement of the accounts of the executor, &c., the personal estate proves insufficient for payment of debts, the court may order a sale of the real. In the same State, an execution against an heir or devisee commands satisfaction, first from the goods of the deceased; if none, from his real estate.(1)

40. In Illinois, the creditor may bring his suit against the executor or administrator, and the heir or heirs, or against the executor, &c., and the devisees, or against all the three classes jointly; even though some of them are minors. Where the personal estate is insufficient for payment of debts, the heir or devisee is liable to the amount of his assets. The property is itself liable, unless *bona fide* aliened before suit brought. If the defendant plead *riens per descent* at the time of suit brought, there shall be a writ of inquiry as to the value of the assets. But, on confession of suit, without confessing assets, or on demurrer, *nil dicit*, or default, there is judgment without inquiry. After a suit against the executor, &c., if there is no sufficient property, a suit lies against the heir or devisee. So, also, where no administration is granted for one year. Where the land is not conveniently divisible, an executor, &c., may sell the whole for payment of debts.(2)

41. In New York, the interest of one deceased, in a contract for the purchase of land, may be sold by the executor, &c.; and provision is made for specific performance of such contract, under direction of the surrogate. In Maryland, a common warrant for land, not executed or located in the debtor's life, is liable for his debts.(3)

42. *Taxes* constitute a peculiar class of debts, for which lands are liable to be sold. A very summary view of the laws of the several States, relating to the sale of real property for taxes, will therefore properly close the present chapter.(a)

43. In Massachusetts, taxes on real estate continue a lien thereupon for two years after they are committed to the collector. The land may be sold. If a part cannot be conveniently, either the whole may be sold, and the surplus proceeds accounted for, or the rents, &c., of the

(1) Misso. St. 52-3-4, 254. See *Smith v. Isaac*, 12 Mis. 106.

(2) Illin. Rev. L. 315-16-17, 644; See *Greenwood v. Spiller*, 2 Scam. 504.

(3) 2 N. Y. Rev. St. 111; *Anth. Shep.* 452.

(a) A tax title has nothing to do with the previous chain of title, and does not in any way connect itself with it. It is a breaking up of all previous titles, and its holder must rely upon that alone. [HITCHCOCK, C. J., dissenting.] *Gwynne v. Niswanger*, 20 Ohio, 556.

To constitute a legal title to land sold for taxes, the claimant must show compliance with all the substantial requisitions of the laws regulating such sales. *Miner v. McLean*, 4 McLean, 138; *Raymond v. Longworth*, Ib. 481; *Arrowsmith v. Burlingim*, Ib. 489.

Land which has been purchased of the United States, and paid for, but not patented, may be taxed by the State in which it lies. *Carroll v. Perry*, 4 McLean, 25.

A conveyance of lands sold for taxes, which, upon its face, shows that legal notice of the sale was not given, is void. *Moore v. Brown*, 4 McLean, 211.

A tax deed is not valid which purports to convey more land than was taxed, or advertised for sale for taxes. *Fitch v. Casey*, 2 Greene, 300.

whole for a term of time. The owner, his heirs or assigns, may redeem within ten years, paying 10 per cent. interest.(1)(a)

44. In Maine, unimproved lands of non-resident proprietors, or improved lands of proprietors living out of the State, or improved real estate, where the owner lives in the State, but not in the town where the land lies; may be sold for taxes.(b) In the two former cases, so much land shall be sold as will pay the tax and charges; and the owner may claim a reconveyance within two years, or four, in case of disability, on payment of this sum, with the intervening charges. The purchaser is liable to damages for any strip or waste. Substantially the same provision is made, in regard to unimproved lands, not taxable by any town or plantation, and improved real estate, the owner of which lives in the State, but not in the town where it lies. In the latter case, upon redemption, the purchaser shall account for the rents and profits, over and above the improvements and taxes. 25 per cent. interest is paid for redemption. Upon taxes *by the State*, 20 per cent. within four years. By a late act, in case of forfeiture to the State under the act of Feb. 17, 1836, for non-payment of taxes, the land may be redeemed by payment, with 20 per cent. interest, in one year from March 10. 1842.(2)

45. In Vermont, lands of persons absent may be sold for taxes; but, ordinarily, taxes are levied only on improved estates, unless in case of some specific statutory provision. One year's redemption is allowed, at 12 per cent. interest, after which time a conveyance is made.(3)

46. In New Hampshire, unimproved lands(b) of non-residents may be sold for taxes. So much shall be sold as will be sufficient to pay the tax and charges. One year's redemption is allowed, at 12 per cent. interest, after which time a deed is given. Improved lands and build-

(1) Mass. Rev. St. 85-6-7.

(2) 4 Griff. 1000-1; Me. L. 1837, 400; 1836, 323-5; 1842, 8. See *Andrews v. Sen-*

ter, 32 Maine, 394; *Matthews v. Light*, *Ib.* 305; *Hobbs v. Clement*, *Ib.* 67. (3) 3 Griff. 18.

(a) The third section of Stat. 1848, c. 166, requiring that the advertisement of the time and place of sale of real estate taken for taxes, shall, "in addition to the provisions contained in Rev. Sts. c. 8, sec. 25, contain a substantially accurate description of the rights, lots, or divisions, of the real estate to be sold." is only explanatory of the statute referred to, under which a description, though not expressly required, was necessary, by which the owner might know what rights, lots, or divisions were to be sold. *Farnum v. Buffum*, 4 Cush. 260.

Where, in an advertisement of the time and place of sale of real estate taken for taxes, estates were described in these terms: "M. B. house and land," and "L. E. house, barn, and one hundred and fifteen acres of land," L. E. being a tenant of M. B., but H. M. having at the time taken possession of the estates under a mortgage from M. B. to him; it was held, that H. M. was the owner. and that his name not being stated in the advertisement, there was no sufficient description within the Rev. Sts. c. 8, sec. 25, providing that where the name of the owner is not known to the collector, the advertisement shall state the amount of the taxes on the several rights, lots, or divisions of the real estate to be sold. *Ib.*

In proving the posting of a notice, by the collector, of the time and place of sale of real estate taken for taxes, in some convenient and public place within his precinct, three weeks before the time of sale, as required by the Rev. Sts. c. 8, sec. 27, the time when such notice was posted must be fixed with certainty, and its contents must be sufficiently shown, in order to identify it with the notice required to be published by the twenty-fourth section of the same chapter. *Ib.*

(b) By a late act, land of *resident* proprietors is also made liable. 1838, 463. (See *Ib.* 502-7; 1833, 58.)

(c) Extended to improved lands. N. H. L. 1830, 11.

ings may be sold for taxes, where neither the goods nor body of the debtor can be found.(1)

47. In Connecticut, so much land may be sold for taxes as will pay the tax and costs. The deed is lodged with the town clerk, and, unless the owner redeems within a year, by paying the purchase-money to the buyer, with 12 per cent. interest, is put on record.(2)

48. In Rhode Island, so much land may be sold as will pay the tax and costs. An absolute title vests in the purchaser.(3)

49. In Alabama, lands, to which a complete title has been obtained from the United States, may be sold for taxes, except that, by the compact with the United States, lands sold by them since September 1, 1819, cannot be taxed for five years from the day of sale. United States' lands are not taxable. Where the fee of land is in the United States, the collector may *rent*, at auction, so much as will pay the tax and costs for one year, or for two years, if necessary. Where the party obtains a complete title, he may have possession by paying the tax and costs, saving to the occupant the crop planted by him. Not more than 30 acres can be sold in one lot. The owner of land sold for taxes may redeem within twelve months, by paying the tax and costs, with 6 per cent. interest.(4)

50. In Mississippi, taxes are preferred to all other claims. Upon a sale of land for taxes, the deed of the assessor and collector passes the title of the party who owes them. The deed is proven, but not recorded for one year. If, within that time, the owner, his executors, &c., pay or tender to the purchaser, &c., or, if he is absent from the State, to the assessor and collector, the consideration paid, subsequent taxes and interest, at 100 per cent., the deed is vacated and given up. Lands are sold for want of chattels, and not more than three hundred and twenty acres in one lot. In case of disability, the owner has one year from its removal to redeem.(5)

51. In Virginia, lands formerly were not sold for taxes. It seems, that for delinquency in paying them, the lands vested in the State, subject to redemption. By a recent act, they are sold, subject to redemption in two years, at 10 per cent. interest, within which time no deed is given. Taxes are also a lien upon the lands on which they are assessed.(6)(a)

52. In South Carolina, the lands of persons living out of the State, may be sold for taxes in fee-simple, in lots not exceeding 640 acres, and no more land is to be sold, than is thought sufficient to pay the taxes, &c. The land of residents, (it seems,) can be sold for no longer term than seven years.(7)

53. In North Carolina, the whole of the land taxed is to be set up for sale, and the person who will pay the tax and charges for the smallest part, is the purchaser, and may select the land in one compact body, as nearly square as may be, adjoining to some of the outlines of the tract.

(1) Ib. 43. See N. H. L. 1832, 63.

(2) 3 Griff. 74.

(3) Ib. 112.

(4) 4 Griff. 580-1; Aik. 414.

(5) Missi. Rev. C. 290-1. See Dixon v.

Porter, 23 Miss. 84. *Boisgerard v. Johnson*, 23 Miss. 122.

(6) 2 Vir. Rev. C. 1819, 39; 3 Griff. 356; Va. L. 1831-2, 64; 1840-1, 26.

(7) 3 Griff. 218-9-20.

(a) See Va. L. 1832, 8; St. 1843, 248.

The owner may redeem within twelve months, at 25 per cent. interest, after which time a deed is given.(1)

54. In Georgia and Michigan, a sale of lands for taxes is absolute.(2)

55. In Maryland, real estate is sold for payment of taxes, in default of personal. Only so much shall be sold as will discharge the tax and costs, unless the property consists of a lot in a town or city, which cannot be divided without material injury, in which case the surplus proceeds shall be deposited for the owner. Redemption is allowed within 12 months, at 20 per cent. interest, after which a deed is given.(3)

56. In Delaware, for want of effects upon the land or other remedy, so much timber or grass growing thereon, or, for want thereof, so much of the land, shall be sold, as will pay the tax. The purchaser takes the land subject to all incumbrances prior to the sale.(4)

57. In Pennsylvania, *unseated* lands may be sold for taxes. The owner may redeem, by paying the tax, cost, and 25 per cent. interest, within five years from the county, or within two from an individual. An orphan or insane person, within the United States, may redeem within two years from the removal of his disability. The county purchases the land, when it does not sell for the amount due; and, in such case, after the right of redemption is gone, the county may make a new public sale. In case of redemption, the owner must pay for all improvements. It having been previously decided that any irregularity in the proceedings would avoid the deed, a statute provides otherwise.(5)

58. In New Jersey, lands are never sold for taxes. Tenants or others in possession or charge of lands are liable for such taxes. So the timber, wood or herbage upon lands may be sold, where the property taxed is unimproved or untenanted, or tenanted by a person who is not the proprietor.(6)

59. In New York, the purchaser receives a certificate. The owner, or any one for him, may redeem within two years, by paying to the treasurer the purchase-money, with 10 per cent. interest; after which time a deed is given. A mortgagee may redeem land sold for taxes.(7)

60. In Tennessee, all lands to which the Indian title is extinguished are taxable. Lands may be sold for taxes, for want of personal property. Where part of a tract is sold, it is to be taken in a square or oblong, commencing at the beginning corner of the tract; or, if that part of the tract has been sold, it is to be taken off the original tract, beginning on the line of the same, and to adjoin the part before sold, and run in a square or oblong. No deed is given till 12 months from the sale, within which the owner or his representatives may redeem, by paying the tax, costs, and interest, at 50 per cent. Taxes are a lien upon all property.(8) Entries, plats and certificates may be sold for taxes, and the purchaser may take out a grant.(9) Lands held by deed, grant, entry, or dower, are made subject to taxation.(10)

61. In Kentucky, where there is no property for the sheriff to levy

(1) 3 Griff. 856-7. See *Love v. Gates*, 4 Dev. & B. 363; *Pentland v. Stewart*, Ib. 386; *Saunders v. McLin*, 1 Ired. 572.

(2) Ib. 442-3.

(3) 4 Griff. 932-3; Md. L. 1831, 99.

(4) 4 Griff. 1059.

(5) 3 Griff. 258-60. See Penns. St. 1842, 266.

(6) 4 Griff. 1272-3-4; 1 N. J. L. 308, 465, 511.

(7) 1 N. Y. Rev. St. 409; St. 1840, 336. See St. 1841, 325; 1842, 191; *Leggett v. Rogers*, 9 Barb. 406.

(8) 3 Griff. 784-5.

(9) Ten. St. 1821, 48.

(10) St. 1835-6, p. 58.

on for payment of taxes, the land may be struck off to the Commonwealth, subject to redemption within two years, by paying 100 per cent. on the amount of the tax, and all taxes subsequent to the sale.(1)

62. In Illinois, redemption of lands sold for taxes is allowed, on payment of twice the amount of the purchase-money(a) within two years. The lands of residents cannot be sold, till after a sale of all the personal property. For want of bidders, the land is struck off to the county, subject to redemption.(2)

63. In Missouri, land is forfeited for taxes after four years. • The owner may prevent forfeiture by paying 15 per cent. interest.(3)(b)

64. In Indiana, lands are sold for taxes, for want of goods.(4) Upon such sale, the collector gives the purchaser a certificate, which is transferable(c) by indorsement, like a bond. The owner or claimant, within two years(d) from date of the certificate, may redeem, by paying to the purchaser, his heirs or assigns, or to the clerk of the Circuit Court of the county for his use, the sum named in the certificate, with one hundred per cent. interest, together with such other taxes, costs and charges upon the lot sold, as mentioned in the certificate, as may have accrued and been paid by the purchaser. The vouchers shall be deposited with the clerk, or produced to the owner of the land. If not redeemed, a deed is given of the land, which passes an absolute title, subject to taxes, &c., since the sale. Such deed is held *prima facie* evidence of the regularity of the sale. Infants, idiots, insane persons, and *femes covert*, are allowed three years to redeem. The sale is invalid, if the tax have been previously paid.(5) Taxes constitute a lien upon land. The land need not be sold as belonging to any particular person, and a mis-description will not avoid the sale. The collector may resell, unless the purchaser pays within a certain time.(6)

65. In Ohio, upon sale of land for taxes, it shall be sold to the person who will pay the tax for the smallest quantity of land. Each tract is sold separately. If the purchaser does not immediately pay the price, there shall be a resale, with a penalty of twenty-five per cent. upon the tax, &c. If there are no bidders, the land becomes forfeited to the State, subject to redemption, until the State have disposed of it. The county auditor gives a certificate, directed to the county surveyor, requiring him to lay off as near a square as possible, at the north-west corner of the lot; and, if the sale is from an in-lot or an out-lot in any town, the survey shall be such that the part sold may run from the main street, road or alley, making the most convenient front to the rear of the lot, and be bounded by lines as nearly parallel as possible with the outlines of the lot. Otherwise, an equitable survey shall be made. The plat and certificate of a surveyor, or, where an entire tract is sold, the deed

(1) 4 Griff. 1132. See St. 1844-5, 16-17.

(2) 3 Griff. 421-2. See *Maxey v. Clabaugh*, 1 Gilm. 26; *Hinman v. Pope*, Ib. 131.

(3) Misso. St. 542. See St. 1838, 102; 1840-1, 117.

(4) Ind. Rev. L. 434.

(5) Ib. 435-6.

(6) Ib. 437.

(a) Six per cent. if the State purchases.

(b) A deed of conveyance from the register of lands, of land sold for taxes, of itself makes no title. *Bosworth v. Bryan*, 14 Mis. 575.

(c) So in Ohio. Ohio St. 1824, 90-6.

(d) So in Mississippi. Rev. C. 290-1.

of an auditor, is *prima facie* evidence of title. Where one joint tenant, &c., pays his share of the tax, he may have partition, and the part paid for set off to him, and shall be no further liable.(1) Where the proceedings in a sale for taxes are irregular, the lien of the State passes to the purchaser, and he may claim from the owner the amount due for taxes, &c.(2)(a)

CHAPTER CI.

PERPETUITIES.

PERPETUITIES have been often incidentally noticed in the foregoing work, and therefore require a very brief separate consideration.(b) The general rule is, that real property shall not in any case be rendered perpetually unalienable. And the rule is adopted in equity as well as at law. In England, after numerous cases had arisen, involving the validity of *settlements*, made for the benefit of a wife, and the children of the marriage successively; the rule was finally established, that real property may be rendered unalienable for a life in being, and twenty-one years after; that is, till the son of a tenant for life came of age. From one life, the courts gradually proceeded to several lives in being at the same time; for these in fact only amounted to the life of the survivor. And, as a tenant for life, to whose unborn son an estate tail is limited, might die leaving his wife *enceinte*, an allowance has also been made for the time of gestation of a posthumous son. The settled rule of law now is, therefore, that an estate may be rendered unalienable for any number of lives in being and twenty-one years and nine months thereafter; but all restraints on alienation which exceed that period are void. The rule applies to *springing and shifting uses*, created to arise upon or after a limitation in fee-simple. The event, on which such estate in fee is to change, must be such, that it shall either take place or become impossible within the time above mentioned. So the uses created by an appointment under a *power* must be such, as would have been valid, if limited in the deed by which the power was given. Hence, an estate tail, limited to the use of persons unborn by deed or will, cannot, by virtue of any power, given by such deed, &c., to trustees, be revoked, upon the births of such persons, and a new estate limited to such persons for their lives respectively, with remainder to their issue, succe-

(1) Ohio St. 1824, 90-6.

| (2) Ib. 1831, 289.

(a) In Ohio, where a party has made an entry and survey of lands of the United States, under a warrant, such lands become subject to taxation by the State; and, if sold for taxes, the purchaser at such tax sale will take a legal title, as against the former owner, although the patent has never issued from the United States, and, subsequently, such owner should obtain from the United States a patent for the land in accordance with his warrant, entry, and survey. [HITCHCOCK, C. J., dissenting.] *Gwynne v. Niswanger*, 20 Ohio, 556.

As to sales for taxes in Arkansas, see St. 1843, 55. As to the construction of tax deeds, *Blakely v. Bestor*, 13 Illin. 708. As to tax laws of Florida, See *Levy v. Smith*, 4 Flor. 154; *Moseley, &c. v. Tift*, 4, 402.

(b) See *Estate in Fee, Estate Tail, Executory Devises, Contingent Remainders, Conditions*.

sively in tail male. The above rule also applies to declarations of trust of *terms*. But not to contingent uses upon or after an estate tail. These may be given so as to take effect at any indefinite period; because the tenant in tail has the power of barring the entailment, and thereby defeating the other limitation. It has been doubted, whether a limitation for life to an unborn person was good; but the question seems now settled in the affirmative. So an estate may be limited by an appointment to a person for life, unborn at the time when the deed by which the power was created was executed. A vested remainder may be limited upon a life estate given to an unborn person. The parties in interest may together dispose of the whole estate. It is not, therefore, *unalienable*. But an estate limited to the issue of an unborn person, as purchasers, is void, being a *possibility upon a possibility*, and rendering the estate unalienable beyond the legal period. But in such case, the limitation for life may be valid. Estates may be rendered unalienable by act of Parliament.(1)(a)

CHAPTER CII.

RIGHT OF EMINENT DOMAIN, AS TO REAL PROPERTY.

I. THE right of the public to take private lands for public uses has been incidentally noticed, under several previous titles.(b) A few miscellaneous observations remain to be added.

(1) 3 Cha. Ca. 31; 1 Vern. 164; Amb. 375; 5 Ves. 458; Co. Lit. 290 b, n. 1; 2 Bro. Parl. 204; 4, 319; 2 P. Wms. 689; Barnard, 54; 3 Ves. 387; 12, 217; Show. Parl. 104; 2 S. & R. 507; 18 John. 184; Com. 20; 3 Bro. Parl. 232; Co. Lit. 327 a, n. 1; 1 E. 452; 2 Ves. 357; Fearn v. Exec. Dev. 502; 5 Rep. 3; Cadell v. Palmer, 1 Clark & F. 373; Hone v. Van Schaick, 7 Paige, 221; Van Vechten v. Van Veghden, 8, 104; De Peyster v. Clendening, 8 Paige, 295; Newman v. Newman, 10 Sim. 61; Bulkley v. De Peyster, 26 Wend. 21; Parks v. Parks, 9 Paige, 107; Zollicoffer v. Zollicoffer, 4 Dev. & B. 438; Threadgill v. Ingram, 1 Ired. 577; Moody v. Walker, 3 Pike, 147; Doe v. Ward, 9 Ad. & Ell. 582; — v. Ewart, 7, 636; Ellicombe v. Gompertz, 3 My. & C. 127; Case v. Drozier, 2 Keen, 764; Harney v. Harvey, 5 Beav. 134. In Indiana, a devise in trust for the benefit of grandchildren is valid, whether *in esse* or not. Rev. St. 238. See Wilson v. Wilson, 3 Eng. L. & Equ. 138; Taylor v. Frobisher, 10 Ib. 116; De Kay v. Irving, 5 Denio, 646; Challis v. Ewers, 10 Eng. L. & Equ. 429; Thomson v. Livingston, 4 Sandf. 539; Gooch v. Gooch, 8 Eng. L. & Equ. 138.

(a) A limitation to A for life, remainder to B for life, remainder to C and D, and the survivor of them, is within the prohibition of the Statute of New York to prevent the inalienability of property for more than two lives. Arnold v. Gilbert, 5 Barb. 190.

Devise to the testator's granddaughter of real estate and stocks, &c., "to her heirs and assigns, to her and their sole use forever;" the property to be vested in a trustee till the granddaughter came of age. If she died without issue, devise to the daughters of the testator, their heirs and assigns. The will took effect prior to the Revised Statutes of New York. Held, the limitation over was too remote and therefore void, and the granddaughter took an absolute estate. Ferris v. Gibson, 4 Edw. Ch. 707.

The law will not, in the absence of proof, presume a devise void, as creating a perpetuity. Duke of Cumberland v. Graves, 9 Barb. 595.

(b) See *Ways, Franchises, Mills*. Harness v. Chesapeake, &c., 1 Md. Cha. Dec. 248; Hamilton v. Annapolis, &c., Ib. 107.

2. Upon the point how far, in order to render lawful the taking of private property for public uses, the public convenience and necessity must be the exclusive inducement, there seems to be some confusion in the authorities.

3. In New Hampshire, it is held, that the laying out of a road, to be legal, must be required by the public convenience, &c., and independent of any private contributions. And where there is a judgment that the public good requires a road, such condition is void. So a note, the payment of which is made a condition of the laying out of a road, is without consideration and void.(1)

4. But it has been held in Massachusetts, that the cases, which render void the laying out of a road on the ground of private contribution to the cost, are cases of *highways*, and turn upon the point, that the court did not judge distinctly and independently as to the question of public convenience, &c. In one instance, the record showed that the road was regarded as not required by this consideration, if made wholly at the public cost. In reality, the question who is to pay the cost has no bearing upon the other point. The court proceed to decide, that the principle does not apply to *town-ways*, because the law provides substantially the same method for laying out *town* and *private* roads, the former for a town, the latter for individuals, the land-owner being compensated by one or the other accordingly. Hence a *town-way* is valid, though partly paid for by individuals. And for the laying out of a town or private way, no adjudication as to the public convenience is necessary.(2)(a)

(1) *Dudley v. Cilley*, 5 N. H. 558; ———— *Jones v. Andover*, 9 Pick. 154; acc. *Thomas v. Butler*, 10, 281.

(2) *Copeland v. Packard*, 16 Pick. 217; | *v. Leland*, 24 Wend. 65.

(a) But compensation must be made to the land-owner. *Perrine v. Farr*, 2 N. J. 356. It is not necessary to the validity of a way, that the precise words, "common convenience," &c., be used in the petition. *Lockwood v. Gregory*, 4 Day, 407; *Rice, &c. v. Turnpike, &c.*, 7 Dana, 86. Promise of money for the specific object of a railroad corporation, on condition that it should select a certain point as the site of a proposed bridge. Held, the consideration was not illegal as against public policy. *Cumberland, &c. v. Baab*, Law Rep. Oct. 1840, p. 229. It seems, an adjudication "that the public convenience and necessity require the road prayed for should be located in part," in order to be valid, must designate the *termini*; otherwise, a location over part of the road prayed for will be void. *Inhts. &c. v. Co. Commrs., &c.*, 2 Met. 185. The sovereign power has the whole regulation of navigable waters, and may authorize the obstruction of navigation, even though the primary object seems to be the advantage of individuals. *Parker v. Cutler, &c.*, 7 Shepl. 353.

The Board of Aldermen of the city of Boston having referred it to a committee, to consider of a plan for widening B. street, and the committee having agreed upon a plan for that purpose, an offer was made to the board, by one of the proprietors of land abutting on B. street, that, if the city would establish a prospective line for widening said street, according to the report of the committee, and would take from a certain estate, and the proprietors of certain other estates would give sufficient land, from said estates, respectively, for the purpose, such proprietor would give, free of charge, the necessary amount of land which might be required for the purpose from his estates. Held, if such offer was accepted in a reasonable time, and the condition complied with, the contract thereby formed was not invalid, by reason of its supposed interference with the duty of the mayor and aldermen, in deciding upon the public necessity and convenience of the alteration; but would estop such proprietor from claiming damages for his land, if taken therefor, and for the obstruction of his adjoining land, during the laying out of the street; that it was not necessary the mayor and aldermen should accept the proposal in direct terms or by a formal vote, if they took seasonable measures to secure its fulfilment by making the necessary orders for carrying the proposed widening into effect, and by actually accomplishing the same; and that a year and four months was not an unreasonable time for this purpose. *Crockett v. Boston*, 5 Cush.

5. Highways, bridges, canals and other works, for facilitating communication between one part of the territory of a State and another, are peculiarly within the province of the sovereign power of the State, represented and exercised by the legislature. In the cases of more frequent recurrence, as those of roads and ferries, it has been the practice of the legislature to provide for the establishment of this common class of public easements, by delegating the power to some properly constituted body. But in the more rare, and often the more important and interesting cases, as those of bridges over navigable waters, canals, and more recently railroads, the legislature has exercised the power in each particular case, as also in that large class of the most important highways, turnpikes. There seems to be no objection in principle to the exercise of this authority by the legislature, and there are many cases in the books, in which it has been held valid. And in cases of navigable rivers, in which the public have an easement of a more general nature, the Court of Sessions, &c., have no authority to lay out a highway, because inconsistent with the more general public use to which it is appropriated. The court further remark, that in case of railroads, land could be taken in no other way, because none is provided; that the right of the sovereign power of the State is incontestable, and in the want of any other provision for its exercise, is necessarily vested in the legislature.(1)

6. It is held, in Ohio, that the erection of a toll bridge is as much an object of public concern as the laying out of a turnpike; that the legislature may confer a franchise for this purpose, and authorize the taking of private property, a compensation being provided.(2)

7. It has been held in Maine, that where land is taken for a highway, the legislature must make provision for compensation to the owner *at the time*; otherwise the act is unconstitutional.(3) But in New York, it is sufficient that payment is provided for, though not actually made.(4) A similar doctrine is now held in England.(5)

8. A riparian proprietor has the same right *to the use* of the water, as the owner of land has to the land itself. Hence no other proprietor can disturb such use. But he may be deprived of it for the public welfare, provided he receives a suitable compensation.(4)(b)

(1) *Wellington, &c.*, 16 Pick. 103; *Backus v. Lebanon*, 11 N. H. 20. See *Bridgeport v. Hubbell*, 5 Conn. 237; *People v. Supervisors, &c.*, 19 Wend. 120; *Lyon v. Jerome*, 26 Wend. 485; *Newville, &c.*, 8 Watts, 172; *Gilson, &c.*, Ib. 243; *Wilmington, &c. v. Trimble*, 4 Whart. 47; *Rice, &c. v. Turnpike, &c.*, 7 Dana, 86.

(2) *Young v. Buckingham*, 5 Ohio, 488.

(3) *Comins v. Bradbury*, 1 Fairf. 447; *Bloodgood v. Mohawk, &c.* 18 Wend. 9; *Smith v. Helmer*, 7 Barb. 416; *Harkins v. Lawrence*, 8 Blackf. 266; *Lister v. Lobley*, 7 Ad. & Ell. 124.

(4) *Cooper v. Williams*, 5 Ohio, 392.

(a) So in Indiana. *McCormick v. Lafayette*, 1 Smith, 83. Otherwise, in case of turnpikes. *Meserole v. Mayor, &c.*, 8 Paige, 198. The appropriation of lands for a canal by the agents of the State, gives a right to enter and use the soil, but vests no fee in the State till appraisal. *Baker v. Johnson*, 2 Hill, 342. Where property is appropriated to public uses, the title does not vest in the State, till *actual payment* to the owner; but the appropriation may be made upon a mere provision for future compensation. *Rubottom v. McClure*, 4 Blackf. 507. See *Armistead v. North, &c.*, 4 Eng. L. & Equ. 216; *Worsley v. South, &c.*, Ib. 223; *Patrick v. Beaufort*, 4 Ib. 496.

Where the words of a railroad company's act are capable of two interpretations, but the general intent of the legislature is complete indemnification for land taken, the court will incline to that construction. *Eton, &c.*, 1 Eng. L. & Equ. 51.

(b) It has been held that the legislature may incorporate a company for dock and slack-water navigation, without compensation to mill-owners affected thereby. *Monongahela, &c.*,

9. Where part of land under lease is taken for a road, this has no effect upon the lease, or the rent. Both the lessor and lessee may recover their respective damages.(1)

10. In New Hampshire, the charter for a turnpike is a *contract*, within the protection of the constitution of the United States, but subject to the right of eminent domain, though the powers of the company may be thereby suspended, or the company itself dissolved. Thus a free road may be made. So, although the charter reserved the right to the legislature of buying the turnpike.(2)

11. Where a railroad corporation, authorized to enter upon and use a highway, make an embankment, which intercepts the course of an adjoining owner to such highway; he is entitled to damages, notwithstanding the charter.(3)

12. The right of eminent domain does not authorize the legislature to take the property of one man and give it to another, with or without compensation.(4)

13. A corporation was empowered to construct a canal with necessary waste weirs, &c. The route to be fixed, damages appraised, &c., by commissioners. Water from a wear, after passing other lands, flowed upon land of A and injured it, though nothing was done but what was necessary to protect the canal. No compensation was provided for A. Held, the depriving one of the ordinary use of his land was a *taking* of it, and entitled him to damages.(5)

14. As the legislature cannot take the property of an individual, so they cannot dispose of that of the public, without compensation.(6)

15. The right of eminent domain is not a *continuing* one, unless so declared. It is construed strictly, and after one selection and appropriation of property under it, no other can be made.(7)(a)

(1) Parks v. Boston, 15 Pick. 198. See Charles, &c. v. Warren, &c., 7, 451.

(2) Backus v. Lebanon, 11 N. H. 19.

(3) Fletcher v. Auburn, &c., 25 Wend. 462.

(4) Norman v. Heist, 5 Watts & S. 171; Hepburn, 3 Bland, 96; Waring v. Waring, 2, 676.

(5) Hooker v. New Haven, &c., 14 Conn. 146.

(6) Hepburn, 3 Bland, 97; Baltimore v. McKim, Ib. 460.

(7) Binney, 2 Bland, 128.

v. Coons, 6 Watts & S. 101. In Pennsylvania, a statute of 1803 allowed the owners upon navigable streams, declared by law to be highways, to erect dams for mills, &c., provided, they should not injure navigation or obstruct the fish. Held, this license was not absolute, but subject to the right of eminent domain. The Monongahela, &c. v. Coons, Law Rep. May, 1844, p. 38.

(a) The following recent decisions illustrate and confirm the principles stated in the text. The taking of private property for public use can only be justified, by the sovereign right of eminent domain, and its exercise is restricted to cases of public necessity and just compensation. The People v. White, 11 Barb. 26.

The provisions on this subject, in the constitutions of the United States and State of New York, are only declaratory of a previously existing universal law. Ib.

It belongs to the sovereign power, to determine the necessity and expediency of appropriating private property to public uses, and the courts have no power to review that determination. Harris v. Thompson, 9 Barb. 350.

The New York constitution of 1841 prohibits the sale of the salt lands, and lands contiguous. Held, to render this provision applicable, the lands must be clearly shown to fall within it; and that it does not apply to the taking of lands for highways and railroads. Parmelee v. Oswego, &c., 7 Barb. 599.

Money, collected upon an assessment for grading a public avenue in a city, is *property*, within the section of the constitution, which provides that private property shall not be taken for public use, without just compensation. [Morse, J., dissenting.] The People v. The Mayor &c., 9 Barb. 535.

Where land is taken for a street in a city, and compensation made, the city has a right to appropriate the land to all such legitimate uses and servitudes, as custom and the public good require. *Plant v. Long Island, &c., 10 Barb. 26.*

Private property may be taken for public uses without compensation, in cases of extreme necessity—as in case of the pulling down of houses, and raising of bulwarks against an enemy, or of ramparts against an invading foe. *Parkham v. The Justices, &c., 9 Geo. 341.*

The Statute of 1813, (in New York,) giving the mayor, &c., power, in case of fire, to pull down and destroy buildings, for the purpose of preventing the spread of the fire, has been held unconstitutional in New Jersey. *American, &c. v. Lawrence, 1 N. J. 714.* Reversing *American, &c. v. Lawrence, Ib. 248.* The act is held an *official or governmental*, not an individual act, and not justifiable by the law of overwhelming necessity. *Ib.*

The act in relation to the city of New York, authorizing the corporation, when the opening or widening of a street takes part of an entire lot, in the discretion of the commissioner, to estimate and assess the whole of such lot, and award damages to the owner accordingly, and providing that the title shall thereupon vest in the corporation; is unconstitutional and void, so far as it provides for taking land not wanted for the street. *Embury v. Conner, 2 Sandf. 98.*

An act, by which certain persons were incorporated as an aqueduct company, for the purpose of supplying a village with pure water, with authority to take springs, lands and rights, and subject to the payment of damages therefor, as provided by law in the case of land taken for highways, is not unconstitutional, on the alleged ground, that it authorizes the taking of private rights of property for a use which is not public; although it contains no express provision requiring the corporation to supply, on reasonable terms, all persons applying for water. *Lumbard v. Stearns, 4 Cush. 60.*

A law, which authorizes the taking of private property for public uses, is not necessarily unconstitutional, because it omits to provide compensation for those who, although their property is not taken, suffer indirect or consequential damage. *Radcliff v. The Mayor, &c., 4 Comst. 195.*

The compensation required by the constitution to be paid, whenever private property is taken for public use, does not consist of real or imaginary benefits derived from such improvements, but can only be made in money. *The People v. The Mayor, &c., 6 Barb. 209.*

Where the lands of any given number of persons are taken or assessed, to provide a municipal corporation with the means of dedicating, grading and paving a public avenue, for public use; unless the body corporate pays something out of the public treasury, or parts with some portion of the public property as an equivalent, it cannot be said to make compensation. [Per Brown, J.] *The People v. The Mayor, &c., 9 Barb. 535.*

Just compensation for property taken wrongfully, or taken under the pressure of public necessity, means nothing less than the prompt restoration of everything taken, or its equivalent rendered in something which the taker has a right to bestow. [Per Brown, J.] *Ib.*

The taking of land for a public highway, is not such an appropriation of the property to the public use, within the constitution of Vermont, (part 1, art. 2,) as necessarily requires compensation in money. There should be such a taking of the property as divests the owner of all title to, or control over it, and amounts to an unqualified appropriation of it to the public. *Livermore v. Jamaica, 23 Vt. 361.*

The statute, [Rev. Stat. c. 20, sec. 53; Comp. St. c. 22, sec. 67,] which provides, that, in estimating the damages, which may be sustained by any person, owning or interested in lands, by reason of laying out or altering any highway, the benefit which such person may receive thereby shall be taken into consideration, is not repugnant to that article of the constitution of the State, [Const. part 1, art. 2,] which provides, that, whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money. *Ib.*

Where an act of the legislature contemplates the taking of private property for public use, and makes provision for the payment of damages sustained by individuals, any subsequent act, which tends to deprive such individuals of compensation, is void; although, by such subsequent act, the property returns to the same individuals. *The People v. The Supervisors, &c., 4 Barb. 64.*

It seems, that a statute, which authorizes the transfer of one man's property to another without the consent of the owner, is unconstitutional and void, although compensation is made. *Embury v. Conner, 3 Comst. 511.*

But the benefit of the constitutional provision may be waived by the party interested; and, therefore, a law providing for the transfer of property from one individual to another, with the consent of the owner, is not unconstitutional. *Ib.*

And if such law dispenses with the written consent of the owner, his consent may be shown by parol evidence of his acts and declarations, so that the title to the land will pass, notwithstanding the statute of frauds. *Ib.*

The provision in the act relating to the city of New York, (2 R. L. 116, sec. 179,) authorizing the commissioners in certain cases, where parts of lots or parcels of land were required for the improving of streets, to include in their estimates and assessments the whole of such lots or parcels, and vesting the residue of the lands, not actually required for the purposes of

such improvements, in the corporation of the city of New York in fee-simple, with the right to dispose of the same; should, it seems, be read and construed so as to require the consent of the owner as to the part not required for public use, and therefore is not unconstitutional. *Ib.*

And where, under the act, proceedings are taken with the consent of the owner, and duly confirmed by the court, and the damages are paid pursuant to the statute, such proceedings operate as a conveyance of the land by the owner, and vest the title in the corporation. *Ib.*

It seems, that the disability of a *feme covert*, to give consent to the taking of her land by a public corporation, will be removed by a statute authorizing the land to be taken, provided the owners consent—there being no exception made to this proviso. *Embury v. Conner*, 3 Comst. 511.

If, at the time of the adjudication by county commissioners that the location of a highway petitioned for is of common convenience and necessity, an owner of land waives all claim to damages, he will be bound thereby, and cannot afterwards, at the location of such highway, retract his waiver and claim damages. *White v. County, &c.*, 2 Cush. 361.

Land was taken under the act of 1819, for the Erie Canal, used as the bed of the canal for a number of years, and afterwards abandoned by the State, and the canal located in a different place. Held, such land reverted to the original owner, although the act declared that it should vest in the State in fee-simple. *The People v. White*, 11 Barb. 26.

Many recent questions upon this subject have grown out of the general establishment of *railroads*.

A law which authorizes an entry upon land, for the purpose of making the preliminary or final surveys for a railroad, before compensation is made; is not unconstitutional, if it makes suitable provision for compensation, in case the land shall subsequently be taken for such railroad. *Polly v. Saratoga, &c.*, 9 Barb. 449.

An act, by which a railroad corporation was established in the usual manner, and with the ordinary powers and privileges, authorized the corporation to locate their road, so that the same might pass over certain land, which belonged to and was held by the Commonwealth, as a body politic, for a particular purpose, but without any expression in the act of a design, on the part of the legislature, to aid the corporation in their undertaking. Held, it was not the intention to grant the land of the Commonwealth, or any easement therein, to the corporation, without compensation; and, if such land were taken by the corporation for their road, the Commonwealth might claim damages, before the appropriate tribunal, in the same manner as an individual proprietor. *Com. v. Boston, &c.*, 3 Cush. 25.

The Hudson River R. R. Co. was authorized, by the legislature, to construct a railroad between the cities of New York and Albany, commencing in New York, with the consent of the corporation of the city; and the directors were authorized to locate the work along certain streets of the city, with the consent of the mayor and common council. The railroad was constructed along such streets with the consent of the mayor and aldermen, and the owners of certain lots abutting on said streets sought to obtain an injunction to prevent the company from laying down their rails along said streets, on the ground that it was taking private property without compensation, and that such road was a nuisance. Held, the court would not thus interfere; that, for contingent and consequential damages, there was a right of action at law; that this was not a taking of private property without compensation, within the meaning of the constitution; that the prohibition was against *taking* private property, and not against injuries to private property; that a railroad is not *per se* a nuisance, and the use of a street for a railroad track, so as not to obstruct the right of passage of the public, did not amount to a nuisance, or a purpresture: and that the rule applied, even where the surface of the street was slightly varied in the construction of the track. *Drake v. Hudson, &c.*, 7 Barb. 508.

Where the land of one deceased is taken for a railroad, the heir and not the administrator is entitled to the damages and to prosecute for the recovery thereof, although the administrator had previously represented the estate to be insolvent, and afterwards obtained a license to sell the real estate for payment of debts. *Boynnton v. Peterborough, &c.*, 4 Cush. 467.

In estimating the damages for land taken for a highway or railroad, any direct and peculiar benefit or increase of value, accruing therefrom to land of the same owner adjoining or connected with the land taken, and forming part of the same parcel or tract, is to be considered by the jury, and allowed by way of set-off; but not any general benefit or increase of value, received by such land in common with other lands in the neighborhood, nor any benefit to other land of the same owner, though in the same town. *Meacham v. Fitchburg Railroad*, 4 Cush. 291.

Evidence is not admissible of the price paid by the respondents, for land adjoining the land in question, under an award of arbitrators, mutually agreed upon to estimate the same. *White v. Fitchburg Railroad*, 4 Cush. 440.

The present value of the lands, not at a forced sale, but at a sale which a prudent holder would make, if he had the power of election as to time and terms, is to govern. It is proper to regard the location of the land, and the probabilities which a prudent man would enter-

tain, of the increased value of the property for building purposes. *Somerville, &c. v. Doughty*, 2 N. J. 495.

It is not competent, in order to rebut the opinions of witnesses as to the value of land taken for a railroad, to show that in other towns lands had been increased in value by the proximity of the road. [Ogden, J., dissenting.] *Ib.*

In estimating damages to an estate by the construction of a railroad, the jury are to take into consideration the injury to the lands not taken, to the owner's dwelling-house on the estate, the subjection of his family to danger, his buildings to risks of fire, the inconvenience caused by embankments and excavations, and deterioration of his lands for agricultural purposes or for building lots. [Ogden, J., dissenting, as to danger of family, and risk of fire.] *Somerville, &c. v. Doughty*, 2 New. Jer. 495.

Appraisers, appointed to value land taken by a railroad company, are not authorized to appraise the land, with a reservation of easements and privileges to the owner, but must appraise the land at its actual value. Therefore, where the inquisition stated that the award of damages was "based on the supposition, and made on the condition and with the understanding" that the owners of the land might open a street across the railroad; held, the appraisement was illegal, and the inquisition should be set aside. [Whittlesey, J., dissenting.] *Hill v. Mohawk, &c.*, 5 Denio, 206.

See further *Peavy v. Calais, &c.*, 30 Maine, 498; *Vermont, &c. v. Baxter*, 22 Verm. 365; *Taylor v. County, &c.*, 13 Met. 449; *Porter v. County, &c.*, *Ib.* 479; *Morss v. Boston, &c.*, 2 Cush. 536; *Com. v. Boston, &c.*, 3 Cush. 25; *Sadd v. The Maldon, &c.*, 3 Eng. L. & Equ. 410; *East, &c. v. Gattke*, 3 Eng. L. & Equ. 59; *Collins, &c.*, *Ib.* 143; *Armstead v. North, &c.*, 4 Eng. L. & Equ. 216; *Birmingham, &c. v. Regina*, 4 Eng. L. & Equ. 276; *Worsley v. South, &c.*, 4 Eng. L. & Equ. 223; *Waterford, &c. v. Dalbiac, Ib.* 455; *Burkinshaw v. Birmingham, &c.*, *Ib.* 489; *London, &c. v. Bradley*, 5 *Ib.* 105; *Glover v. North, &c.*, *Ib.* 335; *Doughty v. Somerville, &c.*, 1 N. J. 442.

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A P P E N D I X .

STATUTORY PROVISIONS OMITTED IN THE BODY OF THE WORK.

ESTATES TAIL.

In Indiana, (Rev. Sts.,) estates tail are abolished.

HUSBAND AND WIFE.

In New York, (Sts. 1848, p. 307,) the property of a woman continues hers after marriage. So she may take to her own use by gift, grant, devise, &c.

In Mississippi, (Sts. 1846, ch. 13, p. 152,) rents, &c., of the real estate of married women enure to their separate use. A wife, owning a plantation, may own also, in her own right, anything necessary to carry it on; and for this purpose may contract jointly with her husband, and bind her separate estate. Suits lie in the name of both. Deeds to be jointly executed. The husband is not liable for such debts of his wife.

In Ohio, (Sts. 1849, p. 53,) courts of chancery may amend errors or mistakes in deeds to pass a wife's property in land.

In Illinois, (Sts. 1847, p. 37,) a wife may join in a deed or power of attorney.

In Massachusetts, (Sts. 1849, ch. 87,) a widow inherits real estate which would otherwise escheat.

MORTGAGE.

In Massachusetts, (Sts. 1854, p. 65,) when a mortgage contains a power of sale, in case of conditional judgment, instead of a writ of possession, the demandant may have a decree for sale, with such notices as the court may order; and, if the mortgagor were unmarried, or his wife released her dower, the sale will bar dower. The party selling shall make a report within ten days to the court, under oath, and file it with the clerk, and the court may confirm it, or set it aside and order a resale. Any one interested may *intervene* or be summoned and heard, and the confirmation shall be conclusive against all persons. If the tenant is not seized in fee simple in possession of the whole equity, before any decree, all parties interested or liable to be affected, including married women with a right or possibility of dower, shall be summoned in.

In Virginia, (Code, ch. 116, sec. 6,) property exempt from execution shall not be mortgaged.

In Vermont, (Sta. 1851, p. 42,) a vendor has no lien for the purchase money.

MECHANIC'S LIEN.

In New Jersey, (Sta. 1851, p. 187,) the lien law is extended throughout the state.

In Virginia, (Code, 474,) a mechanic's lien expires, unless suit is brought in six months.

JOINT TENANCY, ETC.

In Wisconsin, (Rev. Sta., ch. 62, sec. 38,) one joint tenant may sue another for his share of the rents, &c.

WORDS IN A DEED, ETC.

In Indiana, (Rev. Sta.,) an inheritance may be created without the word *heirs*.

SHELLEY'S CASE.

In Wisconsin, the rule in Shelley's case is abrogated. Rev. Sta., ch. 56.

EASEMENTS.—LIGHTS.

In Connecticut, (Sta. 1847, p. 38,) no one shall acquire the right to windows and lights by prescription. This shall not affect pending suits.

LIMITATIONS.

As to allowance for *improvements* in a real action, in Maine. Sta. 1853, p. 30.

In Delaware, (Rev. Sta. p. 3,) the state is barred by over twenty years' possession; except in case of salt marsh, beach or shore.

In Ohio, (Sta. 1849, p. 53,) ejectment is limited to seven years. Infants are allowed seven years after their disability is removed.

In Ohio, (Code, 1853, sec. 9,) actions are limited to 21 years, and 10 after disability.

In Wisconsin, (Rev. Sta. ch. 127,) real actions are limited to twenty years.

Adverse possession is proved by cultivation, enclosure, cutting timber, &c. The cultivation of part of the land is sufficient to give title to the whole. Ten years allowed from removal of disability.

In Iowa, the period of limitation is ten years. Code, 334.

ALIENS.

In Pennsylvania, (Sta. 1851, p. 615,) a citizen may inherit or take by devise from an alien. In Connecticut, resident aliens may hold and transmit real estate.

In Maine, (Sta. 1850, p. 197,) a citizen may inherit through an alien. Land bought by an alien descends to native born children. But no alien gains a title by this act.

Extending and enlarging the rights of aliens in real estate in Virginia. Virg. Code, 493-8.

In Indiana, (Rev. Sta. p. 232,) Illinois, (Sta. 1851, p. 149,) Wisconsin, (Rev. Sta., ch. 62, sec. 35,) and Texas, (Sta. 1848,) aliens may take, hold and transmit real estate; and, in Indiana, the titles of aliens, prior to November 1, 1851, are affirmed.

In Delaware, (Rev. Sts. p. 260, ch. 81,) aliens who have made declaration of an intention to become citizens, may take, hold and transmit by descent, though the heirs are aliens, if they reside in the United States. The above statute retro-acts to 1811.

In Georgia, (Sts. 1849-50, p. 46,) an alien citizen, coming to the state to reside, and giving notice of his intention to become a citizen of the United States, may take and hold real estate as a citizen; and, after becoming a citizen, may convey, devise or mortgage. Female aliens may take, hold and convey as citizens. In case of death before citizenship, the estate shall not escheat.

PATENT, GRANT, ETC.

In Maryland, (Sts. 1849, ch. 424,) *escheat warrants* are to be executed within twelve months, and not renewed. Those already issued may be renewed within six months.

In Virginia, (Code, ch. 62, p. 326,) all lands in the Chesapeake Bay, or rivers, creeks, &c., not granted to proprietors and left to common use, shall continue so, for fishing, fowling and hunting.

DEED.

In Indiana, (Rev. Sts. sec. 201,) a grant of more estate than the grantor has shall pass what he has. A release passes all the title of the party making it.

In Wisconsin, (Rev. Sts. ch. 59, p. 326,) a quit claim deed passes all the party's estate.

As to conveyances in Virginia, (Code, 500,) no estates for five years or more shall be transferred, except by deed or will.

WITNESSES.

In Wisconsin, (Rev. Sts. ch. 59, p. 326,) two witnesses are required in a deed.

SEAL.

In Connecticut, (Sts. 1847, p. 28; 1848, p. 49,) all instruments purporting to be specialties, though without seal, have the effect of sealed instruments.

By Sts. 1850, p. 40, the omission of a seal, in a deed or intended specialty, does not invalidate it as such. Not to affect pending suits.

By Sts. 1851, p. 25, if the instrument purport to be a specialty, though without seal, the word seal, or L. S., is good. An impression of a seal on the papers is sufficient.

In New York, (Sts. 1848, p. 305,) the seal of a corporation may be an impression on the paper.

In Wisconsin, (Rev. Sts. ch. 59, p. 326,) a *scroll* is a sufficient seal.

WARRANTY, &c.

In Indiana, (Rev. Sts. 201,) lineal and collateral warranties are abolished; but heirs and devisees are bound by covenants, to the extent of the estate received.

In Wisconsin, (Rev. Sts. ch. 59, p. 326,) no covenant is implied in a conveyance.

ADVERSE POSSESSION.

In Wisconsin, (Rev. Sts. ch. 59, p. 326,) a grant is not void on account of adverse possession.

ACKNOWLEDGMENT, &c.

In Massachusetts, (Sts. 1849, ch. 205,) letters of attorney, for conveyance of land, shall be

acknowledged and recorded; in case of husband and wife, for conveyance of her land (not including release of dower) by both.

In Massachusetts, (Sts. 1851, p. 681,) the execution of deeds may be proved before judges of probate.

In New Jersey, (Sts. 1850, p. 70,) a deed executed out of the state, may be acknowledged or proved before a judge or justice of a district or circuit court, or Chancellor of the State. So with the deed of a married woman.

In New Jersey, (Sts. 1849, p. 238,) letters of attorney to convey, &c., real estates, are to be executed and acknowledged and recorded in the same manner as deeds.

In Tennessee, (Sts. 1848, p. 127,) the deed of an officer or soldier in service, out of the country, may be acknowledged before a colonel, lieutenant colonel, major or commanding officer of his regiment.

In Illinois, (Sts. 1849, p. 131,) deeds may be proved before consuls.

In Illinois, (Sts. 1851, p. 123,) deeds may be acknowledged in other counties than that in which the land lies.

In Indiana, (Rev. Sts.,) deeds shall be recorded in ninety days. Defeasances shall be recorded, to affect the rights of third persons.

In Wisconsin, (Rev. Sts. ch. 59, p. 326,) deeds are acknowledged before a judge of a court of record or commissioner. In other states, before the officers there authorized to take acknowledgments. The certificate shall be authenticated by the certifying officer of a court of record. In foreign countries, the acknowledgment is before a notary, minister plenipotentiary, charge, commissioner or counsel. A *feme covert* is separately examined.

In Virginia, (Code, 500,) a deed by attorney is good, though the words of conveyance and signature be in the name of the attorney alone. So in Ohio. Sts. 1850, p. 103.

DEVISE.

In New Jersey, (Sts. 1850, p. 280,) wills shall be in writing, signed, or acknowledged to have been signed by the testator, and declared, &c., in presence of at least two witnesses at the same time, who shall subscribe in presence of the testator.

The will of a minor is not good. A will is construed as referring to property both real and personal, at the death of the testator, unless the contrary appear.

In Ohio, (Sts. 1849, p. 32; see act of 1851, p. 99,) a title acquired under a will, duly proved in another State, and properly recorded, &c., in Ohio, is not to be defeated, though the will is afterwards set aside.

Devises in Delaware. Rev. Sts. 272.

TAXES.

In Maine, (Sts. 1852, p. 262,) where lands are sold for taxes, as forfeited to the State, the State is not liable for failure of title.

As to taxes in Pennsylvania. Sts. 1847, p. 279.

As to tax sales in Massachusetts. Sts. 1848, ch. 166.

MISCELLANEOUS POINTS.

As to *advancement*, in Virginia, Code, 516; Wisconsin Rev. Sts. 338; California Comp. Sts. 186.

Trusts in Virginia, Code, ch. 116, sec. 16, 17. Contingent remainders. Ib. sec. 12. Joint tenants. Ib. sec. 18.

As to execution of deeds by trustees, &c., in Pennsylvania. Sts. 1850, No. 163, p. 195.

In Ohio, as to title derived from heirs in case of a disputed will. Sts. 1851, p. 99.

As to the lien of a judgment. Code, 1853, sec. 420.

As to partition in Kentucky. See Sts. 1852, p. 71, ch. 13.

As to escheat in Kentucky. Sts. 1852, 1853.

As to estates subject to execution in Kentucky. Sts. 1852, p. 109, 113.

In North Carolina, real estate is made assets under a license of court. Sts. 1846, ch. 1.
Undevised property is first liable. Ib.

In Iowa, (Code, 1851, ch. 81, sec. 1281,) a devise must be in writing, attested by two witnesses. A judgment is a lien upon lands. Ib. ch. 131, p. 334. Real actions are limited to ten years. Ib. 245.

A deed passes all the grantor's title, without the word *heirs*, unless the contrary be expressed. Ib. sec. 1200. A deed is valid, though there be an adverse possession, and though *in futuro*. Ib. secs. 1203, 1204.

HILLIARD ON REAL PROPERTY.

NOTICES OF FORMER EDITIONS.

Of the first edition of this work, *Judge Story* says: "I think the work a very valuable addition to our present stock of judicial literature. It embraces all that part of Mr. Cruise's Digest, which is most useful to American lawyers. But its higher value is, that it presents in a concise, but clear and exact form, the substance of American Law on the same subject. *I know no work that we possess, whose practical utility is likely to be so extensively felt.*" "The wonder is, that the author has been able to bring so great a mass into so condensed a text, at once comprehensive and lucid."

Chancellor Kent says of the work: (Commentaries, Vol. II, p. 635, n., 5th edition :) "It is a work of great labor and intrinsic value."

The American Jurist says: "We have always found" [in it] "the information we were in search of, and the principles correctly and perspicuously stated." "The task he imposed upon himself was one of great toil, and he has resolutely and manfully performed it, evincing a patience of labor, worthy of the students and jurists of a former age." "The lawyer will here find brought into the compass of two reasonable volumes, a vast amount of matter, gathered from many camel-loads of text-books, reports and statutes, correctly stated." *Jurist*, July, 1839.

Previous to the publication of this abridgment, it is well known that Cruise's Digest was the only good treatise upon the Law of Real Property in use in the United States. Mr. H. attempts a compilation embracing the English law of Real Property Americanized, together with the statutory provisions and adjudged cases of each State, and his efforts have been eminently successful. There may be some difference of opinion in the profession, respecting the plan of his work, but none with regard to its execution. The preparation of such a treatise, required no ordinary research in State statutes and decisions, as well as in the English cases; and the consummation of this task places the author among that limited class of laborious writers uncommon in any age. The practical utility of the volumes is common to the whole Union. Marvin, Legal Bibliography.

Hon. Rufus Choate says: "Mr. Hilliard's work has been three or four years in use, and I think that Mr. Justice Story and Chancellor Kent express the general opinion of the Massachusetts' bar."

RECOMMENDATIONS.

Judge Bouvier says: "Below will be found the law of the several States relating to the officer before whom the acknowledgment must be made. Justice requires that credit should be here given for the valuable information which has been derived on this subject from Mr. Hilliard's 'Abridgment of the American Law of Real Property.'" Bouvier's Law Dictionary
—*Acknowledgment.*

